***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

75-1388

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

DOCKET NO. 75-1388

---

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE BURSE,

Appellant.

---

APPENDIX

---

R. WILLIAM STEPHENS
Attorney for Appellant
Maurice Burse
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

UNITED STATES COURT OF APPEALS
FILED
JAN 21 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

# APPENDIX

## Contents

A. Docket entries.

B. Indictment.

C. Opinion of court on photographic suppression hearing.

D. Discussion on requests to charge.

E. Selected requests to charge of defendant.

F. Charge to jury.

G. Summation of United States Attorney.

H. Argument of motion for New Trial.

I. Opinion of court on defendant's motion for New Trial.

# CRIMINAL DOCKET
# UNITED STATES DISTRICT COURT

John T. Curt... CR-74- 227

D. C. Form No. 100 Rev.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| THE UNITED STATES<br>*vs.*<br>MAURICE BURSE and BARRELL DE BOSE | *For U.S.:*<br>William Skretny, Esq.<br>Assistant U.S. Atty.<br>U.S. Courthouse, Bflo,N.Y.<br>(716)842-3479 |
| Conspiracy to commit offenses against the United States by knowingly and willfully and unlawfully rob an FDIC insured bank, in violation of Title 18, U.S.C., Section 371 (Ct. 1); did take and carry away, with intent to steal and purloin money in the management and possession of an FDIC insured bank, in violation of T. 18, U.S.C. Sec. 2113(b) (Ct. 2); did take from the person and presence of an employee, money belonging to and in the possession of an FDIC insured bank, in vio. of T. 18, U.S.C. Sec.2113(a) (Ct. 3) | *For Defendant:*<br>(2) James Robinson<br>(1) R. William Stephens, Esq<br>(assigned)<br>on appeal:<br>R.William Stephens, for de<br>Maurice Burse<br>10 Lafayette Square, Bflo, |
| Offense: 7/30/74 — 3 Cts. | |

| STATISTICAL RECORD | COSTS | | | DATE | NAME OR RECEIPT NO. | REC. | | DISB. | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | N.Y., 14203 | | | | |
| J.S. 2 mailed SEP 5 1974 | Clerk | | | | (716) 852-7587 | | | | |
| J.S. 3 mailed | Marshal | | | | | | | | |
| Violation | Docket fee | | | | | | | | |
| Title 18 | | | | | | | | | |
| Sec. 371, 2113(a), 2113(b) | | | | | | | | | |

| DATE 1974 | PROCEEDINGS |
|---|---|
| Aug. 28 | Filed Indictment |
| Aug. 28 | J S 2 made — Deft |
| Aug. 29 | Deft. pled not guilty. Discovery motions are to be filed by 9/17/74. If motions are filed, Govt is to respond by 9/24. If argument required, scheduled 10/1/7<br>Bail - continued on $1,000 surety bond |
| Sept. 4 | Proceedings before the Magistrate- Atty. Vincent Doyle advised the Court that he i appearing with the deft. Maurice Burse as a retained atty. for the arraignment and a determination will be made within two weeks whether he will be continued as atty. Not guilty plea entered for deft. Bail - $1,000 recog. bond. Discov motions are to be filed by 9/30; the Govt is to respond by 10/7; argument is scheduled 10/22/74. |
| Sept. 5 | Filed Magistrate's Docket Sheet, complaint, affidavit, temporary commitment, $1,00 surety bond, and bail affidavit (Stuyvesant Insurance Company - surety) fo deft. De Bose |
| Sept. 5 | Filed Magistrate's $1,000 Recog. bond for deft. Maurice Burse |
| Sept. 10 | Filed Ct. Steno's minutes of proceedings of 8/29/74 |
| Sept.17 | Proceedings before the Magistrate-(Re: Darrell DeBose) No appearances for deft. No motions filed to date. If motions are filed the Govt is to respond by 9/24 and argument as scheduled on 10/1/74 |
| Sept. 24 | Proceedings before the Magistrate-No motions have been filed for |

| DATE | PROCEEDINGS |
|---|---|
| 1974 Sept.24 | deft. DeBose. Case is being held here pending filing of motions for co-deft, Burse. |
| Oct. 1 | Proceedings before the Magistrate (Re: Maurice Burse) No appearance for deft. No motions have been filed to date |
| Oct. 7 | Filed deft Maurice Burse's notice of motion for an order directing disclosure, discovery and inspection, production, Bill of Particulars Ret. 10/22/74 Magistrate |
| Oct. 8 | Proceedings before the Magistrate - No appearance for Defendant Maurice Burse; discovery motion has been filed. Argument as scheduled on October 22, 1974 |
| Oct. 15 | Filed Govt's response to deft Maurice Burse's pre-trial motion |
| Oct. 22 | Proceedings before the Magistrate - Atty. Joseph Bermingham of counsel for Vincent Doyle, withdrew as retained counsel for Defendant Maurice Burse; Deft. requested assignment of counsel. Court requested defendant to fill out financial affidavit. Adj. to November 5, 1974 for argument of motions. |
| Oct. 29 | Filed Cy. 5 of CJA-20 - Order appointing R. William Stephens,Esq., as counsel for the Defendant.--MAXWELL, Magistrate. |
| Nov. 1 | Filed Govt's motion to move action for trial-------- |
| Nov. 18 | Filed deft's (Maurice Burse) notice of motion for discovery and inspection, ret. 11/19/74 before the Magistrate. |
| Nov. 19 | Proceedings before the Magistrate - Re: Maurice Burse. Motions have been filed. Attys. requested adj. of argument for two weeks. Argument adj. to 12/3/74 |
| Nov. 20 | Filed Govt's response to Defendant Maurice Burse's motion for Discovery--- |
| Dec. 3 | Proceedings before the Magistrate - Atty. R. William Stephens with the defendant Maurice Burse- Argument on motion to produce statement of co-conspirators and witnesses at the bank- denied. Adj. to 12/17/74 for argument on defendant's motion for "in camera" inspection of Grand Jury minutes. |
| Dec. 12 | Filed Deft. Maurice Burse notice of motion for in camera inspection by Court of the Grand Jury minutes, etc., and for in camera inspection by the Court of all statements, FBI 302 reports and other writings the Govt's file, etc. ret. 12/17/74- Magistrate |
| Dec. 17 | Proceedings before the Magistrate - Maurice Burse - Adj. at the request the Government to Dec. 31, 1974. for argument. |
| Dec. 31 | Proceedings before the Magistrate - Maurice Burse - Govt requested additional two weeks to respond to deft's motion. Adj. to 1/14/75 for argument. |
| 1975 | |
| Jan. 9 | Filed Govt's response to deft Burse's motion for in camera inspection |
| Jan. 14 | Proceedings before the Magistrate - Argument on motion for "in camera" inspection of Grand Jury minutes-granted. Argument on motion for "in camera" inspection of Govt file for Brady material-denied. for a hearing. |
| Jan. 27 | Filed Deft. Burse's notice of motion/- to determine if certain witnesses who have identified photographs of Deft., identified such photographs in an impermissibly suggestive procedure - ret 2/11/1975-Magistrate |
| Jan. 29 | Filed Magistrate's Decision on Deft. Burse's motion alleging heresay testimony was introduced against him in the grand jury proceeding, etc. Maxwell, Magistrate |
| Jan. 30 | Filed Govt's response to motion by Deft. Maurice Burse for hearing to determine possible suggestive identification procedures |

CRIMINAL DOCKET

| DATE | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| 1975 | | | |
| Feb 10 | Re: Maurice Burse. Motion by deft for identification hearing. Adj until 2/18 because of illness of defense counsel. | | |
| Feb 18 | Re: Maurice Burse. Deft's motion for identification hearing. Hearing scheduled for Friday, 2/21 | | |
| Feb 21 | Re: Maurice Burse. Motion by the deft for the disclosure of names of certain Govt. witnesses. Motion denied. | | |
| Mar. 3 | Return date for motions. Wade hearing for deft. Burse to be scheduled. | | |
| Mar.18 | Filed subpoena--Barbara Raimos, served on 3/14/75 | | |
| Mar. 19 | Identification hearing. Government rests. Defendant rests. Transcript to be made. When available court will set a briefing schedule | | |
| Mar. 20 | Filed Cy. 5 of CJA 21--authorization for transcript--cy. 4 to Adm. Offic | | |
| Apr. 4 | Filed Ct. Steno's transcript of proceedings of hearing on motion to suppress,held before the Hon. John T. Curtin on 3/19/75 | | |
| Apr. 7 | Filed cy. 2 of CJA 21--voucher for Ct. Steno's transcript in the amt of $91.25. Orig. to Adm. Office for payment | | |
| May 27 | Filed Deft'Burse's memorandum in support of motion to suppress Photographic Identification | | |
| May 27 | Filed Government's memorandum Of Law | | |
| May 27 | Filed Govt's Proposed Conclusion Of Law | | |
| May 27 | Filed Govt's Proposed Findings Of Fact | | |
| May 27 | Return date for briefs, etc. Govt to file brief today. | | |
| July 2 | Filed Pet. & Order for Writ of Habeas Corpus Ad Prosequ., for plea - Darrell DeBose--CURTIN,J.- ret. 7/3/75 | | |
| July 7 | Filed Writ of Habeas Corpus Ad Prosequendum, for Darrell DeBose, for plea,exec.-7/3/75- | | |
| July 3 | Deft. Darrell DeBose, present with counsel, enters a plea of guilty to count One of the Indictment. Sentence is deferred 8/25/75. | | |
| July 8 | Filed Two subpoenas - Evon Wright, ret. 7/3/75- served 7/3/75; Evon Wright, ret. 8/5/75- served 7/3/75 (this entry applies to Cr-74-234) | | |
| July 10 | Filed Decision and order denying deft. Burse's motion to suppress: Curtin, J. Pre-trial meeting is set for 7/16/75 at 9:00 am. | | |
| July 11 | filed ct. steno's transcript of proceedings of July 3, 1975 | | |
| July 11 | filed cyps 2,5 authorization and voucher for transcript for Maurice Burse in the amt. of $6.00; Orig. to the Adm. office for payment | | |
| July 16 | Pre-trial conference held for deft. Burse. Court orders trial on 8/12/75 or any day thereafter; | | |

D. C. 109

| DATE 1975 | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| Aug. 4 | Filed Cy. of letter dated 7/28/75 from Atty. R. William Stephens, Esq., counsel for deft. Burse, to AUSA William Skretny, setting for the substance of the understanding reached during the pre-tri conference held in chambers on 7/16/75 | | |
| Aug. 4 | Filed letter to Judge Curtin, dated 7/28/75, from Atty. R. William Ste Atty. for deft. Burse, requesting that the deft. be furnished at Govt. expense, a transcript of all testimony of the Co-def DeBose in the case of U.S. v. Green. | | |
| Aug. 4 | Filed Pet. & Ord. for Writ of H.C. Ad Testificandum for Darrell DeBose, ret. 8/8/75 | | |
| Aug. 8 | Filed Three subpoenas - Detective Joseph Schwartz, Michael Cheatom, Michael Piercer, served 8/5/75 | | |
| Aug. 13 | Filed Writ of Habeas Corpus Ad Testificandum - executed- 8/11/75 | | |
| Aug. 13 | Filed Eleven subpoenas - Louise Stevens, Evon Wright - served 8/7/75; Barbara Raimos, Albert DeBose, served 8/8/75; Louise Stevens, Albert De Bose, Mrs. Anna DeBose, Detective Joseph Schwartz, Evon Wright, served 8/11/75; Linda Giles, ret. no service - 8/11/75; Linda Giles, served 8/12/75 | | |
| Sept. 4 | Filed Cy. 2 of CJA-21 - Voucher for transcript in the amt. of $78.75; Orig. to the Adm. Office for payment. | | |
| Sept. 3 | Filed Ct. Stenographer's transcript of the testimony of the witnesses Darrell DeBose, and Yvonne Wright, taken at trial of U.S. v. Gary Green, Cr-74-234, before Judge Curtin, Buffalo, N.Y., 8/ | | |
| Sept. 18 | Filed order under rule 17(b) that subpoenas be issued on behalf of def Burse for service upon: Louise Stevens, Patricia Burse, and Kenneth Burse | | |
| Sept. 19 | Filed Order that subpoenas Duces Tecum in behalf of Deft. Burse, upon the Buffalo City Court, and the Town of Tonawanda Justice Court be served under the provisions of Rule 17(b) of the Federal Rules of Criminal Procedure--CURTIN, J. | | |
| Sept. 22 | Filed sixteen subpoenas - Evon Wright, served 9/18/75; Det. Joseph Schwartz, Louise Stevens, Evon Wright, Albert De Bose, Mrs. Anna DeBose, Michael Pierce, Michael Cheatom, Craig Burse, Mrs. Burse, Jerome Burse, Helen Jurek, Mrs. Pierce, Kenneth Burse, Patricia Burse, all served 9/19/1975; Michael Pierce ret. no-service. | | |
| Sept. 22 | Filed Deft's request for Voir Dire Examination | | |
| " 23 | Govt. moves case ready for trial for Deft. Maurice Burse, before Judge Curtin, at Buffalo, N.Y., whereupon the jury is duly enpanell Trial adj. until tomorrow - Sept. 24, 1975 | | |
| " 24 | Trial continues from yesterday with the same appearances & jury - | | |
| " 24 | Filed two subpoenas (D.T.) - Record Room Custodian, Buffalo City Court and Criminal Record Custodian Town of Tonawanda Justice Cour served 9/22/75 | | |
| " 25 | Trial continues from yesterday with the same appearances & jury. Trial is adj. until tomorrow, Sept. 26, 1975 | | |
| " 25 | Filed Six subpoenas - City Engineer, City of Lackawanna, Barbara Ramo Mrs. Pierce, Michael Pierce, Michael Cheatom, Mrs. Cheaton, served 9/24/75 | | |

| DATE 1975 | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| Sept. 26 | Trial continues from yesterday with the same appearances & jury transcript of Anna DeBose from prior trial U.S. v. Green, read into evidence. Deft. moves to dismiss the indictment on grounds the government has failed to prove guilty beyond a reasonable doubt. Motion denied. Trial adj. until 9/30/75 | | |
| Sept. 26 | Filed subpoena - Barbara Ramos, served 9/22/75 | | |
| Sept. 29 | Filed two subpoenas Eugene F. Jurkiewicz, Frank Desmore, served 9/26/75 | | |
| Sept.30 | Trial continues from 9/26/75. Deft. renews motions made at end of govt's case. Denied. Trial is adj. 10/1/75 | | |
| Oct. 1 | Trial continues from yesterday with the same appearances & jury-- Jury retires to deliberate upon their verdict. Jury to return ~~Oct. 2, 1975, to further deliberate upon their verdict~~ | | |
| Oct. 1 | Filed two subpoenas - Raymond C. Kruger, served 9/29/75: Carol Peters, returned not served | | |
| Oct. 2 | Jury resumes their deliberations from yesterday. Jury returns with the following verdict. Deft. Burse guilty on Count One, ~~not guilty on count two and not guilty on count~~ three of the indictment. On application of the Govt. bail is increased from $1,000 recognizance bond to $5,000 recog. bond. Motions ~~against the verdict are to be heard after the court rules on~~ the defendants motion for a mistrial. | | |
| Oct. 2 | Filed Jury Verdict | | |
| Filed | $5,000 personal recognizance bond | | |
| Oct. 6 | Filed Cy. 5 of CJA-21 - Authorization for transcript in the amt of $62.50; Cy. mailed to the ADM, office | | |
| Oct. 6 | Filed Deft. Burse's notice of motion for a judgment of acquittal, etc. ret. as the court shall direct | | |
| Oct. 8 | Filed Order that the parties are directed to file memoranda in support of their positions re Deft's motions for a judgment of acquittal, new trial, and mistrial, not later than October 28, 1975, and the court will hear oral argument on these motions on October 31, 1975 at 9:30 a.m., pur. to Rules 29 and 33, the court specifically extends the time for the argument of these motions until the 31st of October 1975-CURTIN,J. | | |
| Oct. 8 | Filed Cy. 2 - of CJA-21 - Voucher for transcript in the amt. of $56.75; Orig. to the Adm. office for payment . | | |
| Oct. 10 | Filed Deft. Burse's notice of motion for an order requiring the United States Atty. to submit a complete investigation file ~~to be marked as a court exhibit in this case, and will further~~ move for an order of this court allowing the deft.'s atty. to inspect said file to determine if additional material under ~~Brady v. Maryland was denied to the deft. by the U.S.Attorney,~~ and etc., ret.10/14/75 | | |
| Oct. 14 | Motion by deft. to require Govt. to turn over to deft. their investigation file. Adj. to 10/20/75 | | |

| DATE 1975 | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| t. 21 | Filed Order that the U.S. Atty., shall file as a court exhibit in this case the complete investigation file to be sealed as a court exhibit and deft's motion requesting such relief is hereby granted, and it is further ordered that the defendant's motion to allow the defendant's Atty. to inspect such file, is denied pending the resolution of other motions made by the deft., particularly motions for a mistrial, a new trial and for a directed judgment of acquittal---CURTIN,J. | | |
| t. 20 | Motion to compel Govt. to turn over to deft. its investigative file. Court orders Govt. to file as a court exhibit and deliver to the Clerk of court. | | |
| t. 28 | Filed Government's memorandum In Opposition to Deft"s motions For Judgment of Acquittal, etc. | | |
| t. 30 | Filed Deft. Burse's withdrawal of motion made during the trial of the above entitled action at the close of the prosecutor's summation for a mistrial. | | |
| ct. 30 | Filed Deft's memorandum in support of motion for new trial or for directed judgment of acquittal or for dismissal of the indictment without prejudice | | |
| ct. 28 | Return date for Government brief;to be filed today. | | |
| ct. 31 | Oral augument on defts motion for judgment of acquittal and for a new tr<br>Motions for a mistrial is withdrawn. Decision reserved. Adj. to 11-7-75 decision. | | |
| ov. 7 | Decision on deft. Burse's motion for a new trial and in the alternative for dismissal of the Indictment without prejudice. Court denies deft's motion. Sentence is deferred 11/17/75. | | |
| ov. 14 | Filed Investigative file of U.S. Atty's Office for in-camera inspection, for Deft. Maurice Burse, marked as Court Exhibit | | |
| ov. 17 | Deft. Maurice Burse is sentenced under the Federal Youth Correction Act as follows: Deft. is remanded to the custody of the Atty. Gen., pur. to Title 18, Sect. 5010(c) as a Youthful Offender. Curtin,J. Bail to continue pending appeal. New bail bond is to be executed by the deft. | | |
| ov. 17 | Filed $5,000 personal recog. bond for Maurice Burse, pending appeal | | |
| " 17 | Filed Deft. Maurice Burse notice of appeal. cy. to the U.S. Atty., deft., and the CCA with cy. of docket entries, Form CJA-23, form A | | |

Form No. [illegible]

[illegible] United States District Court

[illegible] Western District of New York

[illegible] UNITED STATES OF AMERICA

-vs-

[illegible] MAURICE BURSE
[illegible] DARRELL DeBOSE

MARCH, 1974 SESSION

No. CR-74-227

Vio. Title 18,
United States Code,
Sections 371
2113(a)
2113(b)

COUNT I

The Grand Jury Charges:

On or about July 30, 1974 and continuously thereafter up to and including the date of the filing of this indictment, at Lackawanna, in the Western District of New York, and elsewhere within and without said District, the defendants

MAURICE BURSE
and
DARRELL DeBOSE

did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other, and with Gary [illegible], a juvenile not named as a defendant, to commit certain acts in violation of Title 18, United States Code, Section 2113(b) of the laws of the United States, that is, to knowingly and willfully and unlawfully rob the Manufacturers and Traders Trust Company, Ridge Road Office, Lackawanna, New York, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Section 371.

[illegible]

ONLY COPY AVAILABLE

OVERT ACTS

1. On or about July 30, 1974, at Buffalo, in the Western District of New York, the defendants, MAURICE BURSE and DARRELL DeBOSE and Gary Green, a juvenile not named as a defendant, met together and with each other.

2. On or about July 30, 1974, at Lackawanna, in the Western District of New York, defendant DARRELL DeBOSE entered the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York and took and carried away the sum of approximately four hundred and ten dollars ($410) from that bank.

3. On or about July 30, 1974, at 40 Steelawanna Street, Lackawanna, New York, in the Western District of New York, defendants MAURICE BURSE and DARRELL DeBOSE and Gary Green, a juvenile not named as a defendant, met together and split the approximately four hundred and ten dollars ($410) taken from the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York.

4. The Grand Jury realleges the acts described in Counts Two and Three as overt acts and incorporates them herein by reference.

All in violation of Title 18, United States Code, Section 371.

COUNT VI

The Grand Jury Further Charges:

On or about July 30, 1974, in the City of Lackawanna, in the Western District of New York, the defendants

MAURICE BURSE
and
DARNELL DeBOSE

did take and carry away, with intent to steal and purloin from the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation, the sum of about four hundred and ten dollars ($410) belonging to and in the care, custody, control, management and possession of that bank;

In violation of Title 18, United States Code, Section 2113(b).

COUNT III

The Grand Jury Further Charges:

On or about July 30, 1974, in the City of Lackawanna, in the Western District of New York, the defendants

MAURICE BURSE
and
DARRELL DeBOSE

by intimidation, did take from the person and presence of Helen Jurek about four hundred and ten dollars ($410.00) in money, belonging to and in the care, custody, control, management and possession of the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Section 2113(a).

John T. Elfvin

JOHN T. ELFVIN
United States Attorney

A TRUE BILL:

Richard S Schaefer

FOREMAN

Form DJ-195
(Ed. 2-7-66)

No. CR-74-227

UNITED STATES DISTRICT COURT

WESTERN District of NEW YORK

XXXXXXXXXXXXXXXXXXXX

THE UNITED STATES OF AMERICA

vs.

MAURICE BURSE

DARRELL DePOSE

INDICTMENT

[illegible]

[illegible] day

of [illegible], A. D. 19[illegible]

[illegible]

[illegible]

GPO 902-482

RECEIVED
JUL 1 1975
RAICHLE, BANNING, WEISS & HALPERN
POST MARKED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA

Plaintiff

-vs- CR-74-227

MAURICE BURSE
DARRELL DeBOSE

Defendants

---

RECEIVED
JUL 1 1 1975
RAICHLE, BANNING, WEISS & HALPERN
POST MARKED

On July 30, 1974 at about 10:30 in the morning, a bank robbery took place at the Ridge Road office of the Manufacturers and Traders Trust Company in Lackawanna, New York. The defendants, Maurice Burse and Darrell DeBose, have been indicted for conspiracy and for a violation of 18 U.S.C. §§2113(a) and 2113(b). One Gary Green, a juvenile not named as a defendant, was named as a coconspirator.

After defendant Maurice Burse moved to suppress photographic identification, a hearing was held on March 19, 1975. A witness, Barbara Ramos, and an FBI agent testified about the events of that day and the subsequent photographic identification made by Mrs. Ramos. After FBI Agent Kruger learned that Mrs. Ramos observed two Negro

boys running in the area of her home, he visited her on August 7, 1974. He spread six photographs on the kitchen counter and Mrs. Ramos identified the photograph of Maurice Burse as one of the men she had seen running near her home shortly after the robbery occurred. At the time she observed the two young men running in the area of her driveway, she was holding an infant in her arms when the youths ran past her and only observed them for "maybe a second or two, not even that." However, she recognized Burse as someone she had seen on a number of prior occasions participating in neighborhood basketball games. Five of the photos were obtained from the Buffalo Police Department and one, that of defendant Maurice Burse, was obtained from the FBI files. The Burse photo has the legend on its face "Federal Bureau of Investigation, Buffalo, New York." Four of the other photos have reference to Buffalo, New York and one has no description of place of origin. Defense complains that the spread was impermissibly suggestive, because it is obvious that four of the pictures have the dates of taking on the face of the photo. One was taken on March 11, 1960,

another on June 19, 1962, the third on February 16, 1958 and the fourth on October 3, 1966. From this, defendant argues that it must have been obvious to the witness that these photos could not be the photograph of the suspect. But it does not appear that she was aware of the numbers or what they meant. However, it would be a better practice to not show witnesses photographs with this information on the print.

The defense also complains about the fact that only six photographs were taken. No doubt it would be better to exhibit a greater number of photos. See United States v. Boston, 508 F.2d 1171, 1177 (2d Cir. 1974). Nevertheless, under all of the circumstances the procedure used was not so "impermissibly suggestive to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968).

The court has examined the photographs which were displayed to the witness. It is evident that the pictures of the individuals displayed there are similar

in facial characteristics and there is nothing to highlight the man who was a suspect in this case.

The motion of defendant to suppress is denied. A pretrial meeting is set for Wednesday, July 16, 1975 at 9:00 a.m.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: July 10, 1975

PROCEEDINGS: September 30, 1975, 2:00 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

MR. STEPHENS: Your Honor, I overlooked when Mr. Skretny was cross examining the witness Craig Burse, I objected and your Honor struck the question, but on the basis of the question which was asked, I move for a mistrial on behalf of the defendant. I am referring to that question which seemed to draw or asked the jury to draw the inference that a defendant or a witness or a member of his family was required to immediately go to the Lackawanna Police Department after learning of an indictment when he knew the person was elsewhere than alleged in the indictment. As your Honor correctly pointed out to the jury in limiting the question, there is no such obligation but we move for a mistrial.

THE COURT: I will deny your motion.

MR. STEPHENS: Thank you.

THE COURT: Most of the requests that are given on either side seem to be in order. There are a few remarks that I will make and if there are any particular objections to any one that I do not cover, please let me know as we go.

I will start with defendant's. As far as request one is concerned, yes. That is not to say that I will charge in exactly the language given and I think it is improper for either side in their summations to say to the jury, "Ladies and gentlemen, you will find that Judge Curtin will charge thus and so". I am saying to you now, if you say that I will stop you because it is up to me to charge and not the lawyers and I am not going to promise you I am going to charge it. I am going to cover these matters but I think in many instances there is a good deal of repetition. I will say it once but there is no requirement I say things again and again, and as you know, I have my own charge in all of these

matters, the duty of the jury, the duty of the court, how to weigh the testimony of witnesses and all those things. They will be covered.

One, two, three, four, five, six, seven will all, I would say, not only be covered of the defendant, but probably in almost that language but not exactly.

Number eight, I certainly will charge about reasonable doubt and I will cover all of the things here but not in the language requested.

Number nine, yes.

Ten, yes.

Eleven. I refuse to charge number twelve as far as how the jury is to apply my directions as to particular witnesses, I will leave up to them and I will leave up to the attorneys. I do not intend to sum up the evidence in this case. It is a short, very, very short case. It seems to me that you can make your summations, - you can make your points in summations and set forth your contentions in a matter much better than I because you are

familiar with the facts, you are familiar with what you feel is important. I always think that the danger is in the Court summing up for both sides is that I leave out important things and put in things that you would rather have left out and I believe that we will leave the summations or the contentions of either side to the summations of the lawyers so that, - yes, Mr. Stephens.

MR. STEPHENS: Judge, you are not going to charge twelve. Will you take judicial notice of the statutes contained and referred to in twelve?

THE COURT: That has already been admitted in evidence, and you may argue that during your summation. I will not comment upon how the statute, - that certainly, the fact that a witness may have been or may not have been aware of a statute and may have been aware of the fact that perhaps she may have violated the statute and how that will influence her testimony or his testimony, the jury can apply from my general charge those notions. I will

leave to your summation, your argument as to why they should give less credit to the testimony of a witness because of his or her knowledge of a particular section.

MR. STEPHENS: But, Judge, the only thing is the jury has never been told how the statute reads and even though I may argue that the particular witness from her testimony could be guilty of violating Section 3 or Section 4 of Title 18, the jury won't be able to determine that unless they hear from you what that section says.

THE COURT: I refuse to charge the words of the particular section. You can refer to the testimony.

MR. STEPHENS: Exception.

THE COURT: You can refer to the answers given by the witness. Mr. Stephens, one other point is this; it is not what the actual wording of the section is. It is what the witness believes that a particular state of affairs are which is important for the jury to consider when they are thinking about whether or not a witness

is telling the truth or not.

MR. STEPHENS: Well, I just except to the failure to charge the jury the language of the section.

THE COURT: All right. I will refuse to charge request number thirteen because it seems to me that if you tell the jury that the defense, in cross examining witnesses, could not inquire of the witnesses whether or not they have been involved in criminal acts with others on prior occasions or convicted of criminal acts unless such convictions are felony convictions, it seems to me simply that then you are telling the jurors that if you were able to inquire about the witness of other bad acts, that they would have had to admit that they have committed other bad acts, and I think that the rules, the intention of the rules is to keep this out of the case. We just get into too many other areas of fact which are not pertinent to the issues, so I will refuse to charge number thirteen.

I refuse to charge number fourteen.

It seems to me there has been no testimony of any witness, of an informer who provides evidence for pay. There is no immunity given here. It is true that someone who testifies for personal advantage or vindication must be examined and weighed by the jury with greater care than other witnesses, but I believe that this will be covered and covered adequately in the general charge on credibility.

The same is true of request number fifteen. It will be covered in the general charge on credibility.

Yes, number sixteen.

Seventeen, yes, and I will cover eighteen, certainly.

I refuse to charge in the language requested in number nineteen because this will be covered in other portions of the charge. The burden, certainly, is upon the Government to prove the case beyond a reasonable doubt, so this will be covered.

MR. STEPHENS: Will it be covered in terms of

alibi, Judge?

THE COURT: Well, I do not see what that has to do with it and I refuse to charge. Why should we repeat that again?

MR. STEPHENS: Well, it is a traditional charge right out of the instructions when there has been testimony tending to show that the defendant was elsewhere than at the place where the crime was committed.

THE COURT: I think if you say it the other way around, it is said and said well. The Government has the burden of proving guilt beyond a reasonable doubt. The defendant has no burden of proof. I refuse to charge that.

Number twenty, the number of witnesses, yes, I will charge that.

Number twenty-one, yes.

Twenty-two, yes.

Twenty-three, yes.

Number twenty-four has two, - well, this will be covered and this is argument again as far as the witness Debose, where he pled guilty to a count carrying a maximum of five years and expects to have

the other counts dismissed. You can state that to the jurors in argument and it will be covered in my general charge on how to handle the testimony of witnesses.

Number twenty-five, yes.

Number twenty-six, yes.

Number twenty-seven, yes. On the Government's --

MR. SKRETNY: Judge, if I may make a comment. I know your Honor has ruled on number nineteen with respect to alibi. We have no objection to some charge from your Honor using the terminology "alibi".

THE COURT: All right. I will charge it then.

MR. SKRETNY: I am not indicating it has to be charged specifically in the language propounded in request number nineteen.

THE COURT: All right.

MR. SKRETNY: But we have no objection to your Honor using the terminology "alibi" in relationship to the term "beyond a reasonable doubt".

THE COURT: All right, very well. I will charge it.

MR. SKRETNY: Thank you.

THE COURT: On the Government's requests, as far as credibility of witnesses, that will be charged. The charge on accomplice testimony will be charged. The request on impeachment by prior inconsistent statement, yes. Prior conviction, yes.

MR. SKRETNY: Judge, we withdraw that. I don't believe there is any evidence with respect to prior conviction.

MR. STEPHENS: Your Honor, there is evidence that the witness Debose entered a plea of guilty. That is a conviction.

THE COURT: Yes. All right. I have already set out as far as the next, failure of defendant to testify, yes. You say "Refusal of witness to answer proper questions".

MR. SKRETNY: We withdraw that. That was in anticipation of rebuttal.

MR. STEPHENS: I assume the next is also withdrawn.

THE COURT: The next one is withdrawn, evidence of intent?

MR. SKRETNY: Yes.

THE COURT: I will certainly charge the statute,

the essential elements, willfully, to take by intimidation, possession of money by a bank.

MR. STEPHENS: We object to 4811.

THE COURT: 4811, possession of recently stolen property. That is on the conspiracy about Mr. --

MR. SKRETNY: Green.

THE COURT: Green.

MR. SKRETNY: That is correct. I think it is relevant to the total issue of the conspiracy itself, those individuals that were participants within that conspiracy.

MR. STEPHENS: The fact that Green had recently stolen property is evidence that Burse was in conspiracy? I don't --

MR. SKRETNY: That is not exactly what I said. I said it is evidence of the conspiracy relevant to the conspiracy. The fact that Green possessed money and the fact that Debose said he was a participant is something the jury must consider in determining the credibility of Debose with respect to Maurice Burse.

THE COURT: I will charge it.

MR. STEPHENS: Exception.

THE COURT: Maps and diagrams, yes.

Direct or indirect evidence, yes.

Some of these we have dealt with and I will repeat again, number two, child witness, yes.

Number three, yes.

Four, I think there is more to it than what is said here.

MR. STEPHENS: We object to four.

THE COURT: I refuse to charge in a language requested.

MR. SKRETNY: We ask that you do direct a charge, your Honor, in your own language with respect to the fact that before somebody's entitled to a charge, it must be shown that the particular witness was equally available or unavailable with respect to the two parties involved in the suit.

THE COURT: For the present, I will leave that for argument and then make up my mind later.

MR. SKRETNY: Thank you.

THE COURT: Number five, yes.

Number six, as far as the amount, yes.

Number seven --

MR. STEPHENS: We object to seven, your Honor.

THE COURT: This is aiding and abetting.

MR. STEPHENS: Yes, your Honor.

THE COURT: Why do you object?

MR. STEPHENS: On the grounds specifically here, your Honor, that the indictment does not set forth Section 2 and in a motion before the Magistrate on November of 1974, we asked the Government to set forth the additional statutes upon which it would rely in the prosecution of this indictment and at that time the Government responded that the defendant would be advised at an appropriate time of the statutes upon which the Government would rely. We have never been advised by the Government that they are going to rely on Section 2. United States vs. Taylor says it is the preferable practice for Section 2 to be alleged in the indictment. It says it is not an error to have it in the indictment but in the peculiar facts of this case

where we have requested the Government to tell us what other statutes they rely on, it seems to me a very late time to tell us now they are going to hold the defendant as an aider and abettor rather than as a principal.

THE COURT: Mr. Skretny, let me ask you this; it seems apparent to me that when this indictment was filed that since you had no pictures of Mr. Burse, no identification of Mr. Burse; you had the evidence we have heard today which was essentially about the information you had at that time, it would seem to me that this kind of a charge as an aider and abettor would be appropriate. Why didn't you state it then?

MR. SKRETNY: Your Honor, it is my understanding that again, as is indicated by defense counsel, we don't have to set forth --

THE COURT: Excuse me. You did not answer my question. My question is, under the circumstances of this case where you had no admission from Burse; you have at the best, - we have had the hearing. You

will recall the evidence at the hearing where the bank manager said that he saw a man as he recalled standing near the doorway. We didn't hear from him at the trial but why didn't you charge him as an aider and abettor at the time that the indictment was filed?

MR. SKRETNY: Because in my opinion evaluating the evidence, which included the statement of Darrell Debose, I thought it was sufficient with respect to supporting the charge of conspiracy and the substantive counts. I did not believe, in my opinion, there was a necessity for going any further.

THE COURT: Then, Mr. Skretny, when you had the meeting last year before the Magistrate which Mr. Stephens referred to, and you were asked upon what other statutes the Government would rely, why did you not tell him then that you were going to rely on Section 2?

MR. SKRETNY: Your Honor, at that time again there was no decision made on my part with respect to a contemplation of anything

other than the sections set forth on the face of the indictment.

THE COURT: All right. Can you tell me now what has occurred since the time of that meeting until the present to convince you that you ought to charge or have charged Section 2, as well as the substantive sections?

MR. SKRETNY: Your Honor, I think just the simple fact that the law does not require us to set it forth would be primarily my reason to you for not setting it forth on a prior occasion, and for asking your Honor to charge it now. There is nothing that has developed since then.

THE COURT: Mr. Skretny, keeping in mind what Taylor says, but also keeping in mind that Taylor says it was the preferable practice, and keeping in mind the specific request of defense counsel to ask the Government's position and also keeping in mind that it is the purpose of an indictment, not only the purpose as far as the spirit of the law, but many cases setting forth that the Government is

stuck with what an indictment charges and that this is an exception to the rule. Usually if the Government charges the wrong section or the Government charges the wrong day, the wrong month, the wrong check or whatever, then they are stuck with that because it is so important that a defendant know beforehand what he is faced with so that he can prepare his defense.

If Mr. Stephens knew beforehand that his man was going to be also charged as an aider and abettor in this particular charge, it seems to me without thinking it all through, but it seems to me that his defense may have been different than the defense offered here, and it is the intransigent behavior of the Government, you know, in all of this business. We keep trying to tell you, "Let us know what you have in mind, what are you driving at". I think it is important in a criminal case that a defendant know exactly what he is faced with. I realize that the law has long been in the federal

scheme of things not to allege aiding and abetting, but under the particular circumstances set forth here, why didn't you do it or why, after some time went on, - eventually now you come to the conclusion that it is necessary. Why wasn't it necessary when we picked the jury and why is it necessary now?

MR. SKRETNY: I can only say this, I have nothing to add with respect to how the case developed at trial as compared against the case as I knew it to be back in December. I just submit to you simply that the la is what it is and I am just going pursuant to the existing law and your Honor can certainly rule in any fashion you feel is appropriate under that statement. The law doesn't require us to do it and we didn't feel it was necessary to do it.

THE COURT: Mr. Skretny, I beg of you to be candid as much as you can. There is no need to be secretive. When you were before the Magistrate, why didn't you say, "Why, it is obvious in this case

we charge him as an aider and abettor", instead of beating around the bush?

MR. SKRETNY: Only because we are not required to do it. That is all I can submit to your Honor, we are just not required to do it, that is the state of the law. If it were anything else then --

THE COURT: The Taylor case, it seems to me, is forecasting the state of the law is changing. Mr. Stephens, what about this?

MR. STEPHENS: Your Honor, it is the position of the defendant that the Government is required to do more than have knee jerk reactions to things, that it is the responsibility of the Government to be, as you say, candid and open. I don't think there is any question that this defendant was charged, was thought to be charged when the indictment was originally presented under 371 and 2. Now, that was left out of the indictment and it was left out in a calculated way because, as Mr. Skretny says, the law says they are not required to do so and there is a pattern in this case, a pattern of,

"We will give you only exactly what you are entitled to. You will get nothing more because we are going to be hard-nosed about it". This is especially true when you compare this Section 2 thing with the thing about the Brady material, and we asked specifically if the Government had anything in their file that indicated that a witness had indicated someone other than the defendant had committed the bank robbery. Brady vs. Maryland is so clear that that be turned over, and we asked for it three times and we never got it and we never got it finally until we said, "By George, in Gary Green's trial it came out in the cross examination of Debose that Debose had said 'Barner had did it'".

THE COURT: All right.

MR. STEPHENS: I don't want to belabor that, but it seems to me that the Government has to be even-handed here and try and apprise the defendant at as early a time as possible. Why couldn't the Government in response to our request in November

have said "We rely on both 371 and Section 2 and we will see how the proof develops", but they don't say that. They say, "We aren't required to cite Section 2 and it is not appropriate at this time that we tell you what sections we are going to rely on if there are any, and we will do so at an appropriate time", and then to come in here just before we are summing up to the jury and say, "All right, we are going on the aiding and abetting theory".

THE COURT: Mr. Skretny, anything else?

MR. SKRETNY: Just simply, Judge, with respect to our even-handed dealings with the defendant. I think we have been more than open. We have made available information far earlier than we had to and the quantity of information we made available was not hassled to. I submit we acted throughout this entire case in the developing stages and during the course of the trial in the most absolute good faith.

THE COURT: I remember our prior conversation

about Brady against Maryland and it seems to me, Mr. Skretny, in dealing with you in the cases you present here that if I say "Yes" in this instance, that means that every case that comes along, we are going to have this continual squabbling about making available to the other side material that they should have at a much earlier stage of the proceedings and it seems to me the spirit of Taylor is that although you do not have to put it in the indictment, if you are, - if a particular direct question is put to you by defense, then you have the obligation to say, "Yes, we will rely on 2". I refuse to charge number seven.

On number eight as I understand it, the only thing I quarrel about here is the fact that I took judicial notice that the map is the City of Lackawanna. Didn't we have the City engineer testify?

MR. SKRETNY: Yes, we did. Again, this was prepared in advance.

THE COURT: All right, and we are going to cover maps and so forth in the other

portions of the charge, so I just won't charge eight.

MR. STEPHENS: On nine I have an objection and I can point out if your Honor prefer, the specific portions of it I object to.

THE COURT: You have some particular language? I do not intend to charge in this language, Mr. Stephens. I will follow my more general charge on conspiracy.

MR. STEPHENS: All right, your Honor.

THE COURT: Maybe as a guidance to me, let me hear what you object to.

MR. STEPHENS: The most important, I think, is at the bottom of Page 12. We would raise objection if any charge is given to the effect that proof that a conspiracy was accomplished is the most persuasive evidence of the existence of the conspiracy itself. That certainly is misleading in this case. We do not by any stretch of the imagination claim that there was no conspiracy or do we claim that the bank wasn't robbed. We freely admit that Gary Green and Darrell Debose conspired and by force, violence, intimidation,

et cetera, et cetera, did all those things, but the fact that that conspiracy was accomplished is not any evidence with respect to the defendant Burse and we also object, - these are sort of minor things.

THE COURT: Mr. Skretny, on that language, do you agree? In other words, if the jury is satisfied that the conspiracy was committed by others, they could not certainly in any way consider that as to the defendant.

MR. SKRETNY: I have no quarrel with that.

MR. STEPHENS: There is another portion of, I believe it is the same on, request number nine, Judge. This is at 14, "The reason the law of conspiracy requires an overt act is because a person might agree to commit a crime and then change his mind". That certainly is not accurate. An abandonment by a person of the conspiracy or a changing of the mind as evidenced by objective facts would not make the person liable under the conspiracy law.

It seems to me it would be a very inaccurate

statement and probably has very little to do with the facts in this case, additionally. Now, also on Page 15 --

THE COURT: I will not charge that language.

MR. STEPHENS: That is all, your Honor.

THE COURT: Nothing else?

MR. STEPHENS: Not on that one, Judge.

THE COURT: Request number ten is merely a summarization of the indictment which I will cover, and number eleven is the same. That I will cover, and number twelve on intimidation, I will cover the definition of "intimidation".

As far as number thirteen is concerned, Mr. Skretny, the last sentence--

MR. STEPHENS: We would request that, your Honor.

THE COURT: I think that that is misleading, certainly. You are referring to his credibility as a witness and then you say "You are not to consider his testimony as evidence of the defendant Maurice Burse's guilt", and I think you certainly mean that you want them to consider his testimony but that you also want them to consider the fact that Darrell Debose

pled guilty only as to the credibility of the witness, and it is no evidence one way or the other --

MR. STEPHENS: Your Honor, I believe if you charge the word "testimony", to plea, then I think it makes sense.

THE COURT: Don't you agree, Mr. Skretny?

MR. SKRETNY: Yes, I do, your Honor.

THE COURT: "You are not to consider his pleas as evidence of defendant Maurice Burse's guilt". Are we ready for the jury?

MR. STEPHENS: Just so it is on the record, Judge, we have an exception to your failure to charge in the exact language we requested where we made a request.

THE COURT: All right. What we should do on that, Mr. Stephens, I have your remarks and at the end of the charge, you should put on the record at that time your exceptions and requests. I have your argument now, but if you want to make it part of the record, you should do it procedurally, according to the rules, at the end of the charge.

Mr. White, could we have the jury up.

In determining the credibility of the witnesses you are also entitled to take into consideration the testimony regarding the relationship between the witness Evon Wright and Kenneth Burse, the brother of the defendant Maurice Burse. There has been testimony which indicates that on many occasions the brother of the defendant, Kenneth Burse, has stayed at the apartment of the witness Evon Wright over night. There is also testimony that Kenneth Burse was present in the apartment of Miss Wright when the F.B.I. agents came investigating the bank robbery. The testimony indicates that the witness Wright did not reveal to the F.B.I. agents the presence of Mr. Debose nor the presence of Kenneth Burse and that Kenneth Burse had previously advised Miss Wright that Mr. Debose had robbed the bank.

You may take this testimony into consideration in determining as jurors whether or not the witness Evon Wright and Kenneth Burse are accomplices as I have defined them to you and you are entitled to consider such testimony in weighing for yourselves the motives which Evon Wright may have in testifying against the defendant Maurice Burse.

You must also consider whether or not the witness Evon Wright is an alleged accomplice, as claimed by the defendant. As I have previously instructed you, if you should find that she is an accomplice as claimed by the defendant, you shall receive her testimony with great caution and weigh it with great care. The determination of whether or not Evon Wright is an accomplice is solely one for the jury's determination.

In this connection you may also consider that Title 18, United States Code, Section 3, which the Court takes judicial notice of, provides that: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

That section further provides that an accessory after the fact can be imprisoned for not more than one-half the maximum term of imprisonment of the principal.

In this connection you will recall the testimony of the witness Wright that Kenneth Burse advised her that the

bank had been robbed and that thereafter when the F.B.I. agents called on her at her home she failed to disclose to them that Mr. Debose, who had robbed the bank and whom Kennet Burse had told her robbed the bank, was on her premises along with Kenneth Burse.

In this connection you may also consider Title 18, United States Code, Section 4, which the Court takes judicial notice of and which provides as follows:

> "Whoever, having knowledge of the actual commission of a felony cognizable by a Court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall [be guilty of a felony]."

That section also provides for a punishment of not more than three years to those guilty of such crime.

Under the Federal rules, neither party is allowed to impeach the credibility of a witness by showing that he has committed prior bad acts or convictions for a crime amounting to a misdemeanor. Thus, for example, the defense in cross-examining witnesses could not inquire of the witnesses whether or not they have been involved in criminal acts with others on prior occasions or convicted of criminal acts unless such convictions are adult felony convictions.

Because such evidence is prohibited by the rules, you are to draw no inferences from the fact that such evidence has not been presented by either party.

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against defendant.

I charge you that the witness Darrell Debose is testifying in such circumstances and that his testimony should be weighed with greater care than the testimony of an ordinary witness.

Evidence has been introduced tending to establish an alibi, which amounts to a contention that the defendant was not present at the time when or at the place where he is alleged to have committed the offense charged in the indictment.

If, after consideration of all the evidence in the case, you have a reasonable doubt as to whether the defendant was present at the time and place the alleged offense was committed, you must acquit him.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

PROCEEDINGS: October 1, 1975, 9:40 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

CHARGE OF THE COURT

THE COURT: Good morning, ladies and gentlemen.

At this time, it is my obligation to instruct you, finally, on the law, as it applies to the issues in this case. You should keep in mind all of the other instructions which I have given to you during the course of the trial and during the course of the jury selection.

In this case, after I finish my instruction to you, you will be given a copy of the indictment to take with you to the jury room to use as a guide. You will also have a very brief verdict form completed which you will mark after Count 1 guilty or not guilty; Count 2 guilty or not guilty and so forth, and this is only given to you for your convenience in your deliberation, because, as I have said before, an indictment

is not any evidence of any criminal conduct at all on the part of the defendant. It is a charge placed against him so that he may know what he is charged with and so that he can prepare his defense and to make sure that he is not charged again for the same crime.

During your deliberation, you will certainly participate, to the best of your ability by giving, certainly, your reasoned, careful suggestions about the facts and how the facts apply to the law in this case. You will also listen carefully to the reasoned comments of your fellow jurors and it is through this intermix that finally you come to certain conclusions. In this process, you should not give up your conscientious, carefully held, reasoned decisions, but on the other hand, if you believe that after listening to your fellow jurors that they have the better argument and that their arguments are based upon the facts and on the law, then you should not hesitate to change your mind.

Certainly, no one should be allowed

to offer any argument based upon prejudice or sympathy or guesswork or speculation or anything like that. You are not, certainly, to recount what has happened on other instances that you have heard of because, as I have said to you time and time again, we are only concerned with a particular charge here against a particular defendant on a certain day as to a particular crime.

You should keep in mind that in this process, that you are not detectives. Whether other individuals participated in criminal conduct, is not before you. The fact that, you know, for example, that Darrell Debose pled guilty to the charge, that has no bearing whatever. It might have some bearing on his credibility, but it has no bearing at all upon the guilt or innocence of Maurice Burse. Whatever may have happened or not happened, or whatever the participation of Gary Green was, again, that is not before you. The issue before you is the guilt or innocence of Maurice Burse as to the three particular counts in this indictment.

In the course of the trial, I have had to rule one way or another. At times, I, perhaps, have had to use strong language and you may have thought that I had gone too far one way or another, but to the best of my ability, I try to apply the rules as I understand them as carefully as I can. I certainly do not mean to infer one way or another or to indicate at all how you should find. That is up to you and you should keep that in mind that my function here is to be impartial, to be an umpire, and to call the issues or call the questions as they come up, make rulings on them as carefully as I can and that is all.

There is a difference in this case. The first count is a conspiracy. That is, the planning of a particular enterprise. The other two counts have to do with the execution. This brings up the point that each count must be weighed separately by you and it is possible that you may find that there is evidence sufficient in one but not in another or you may find, of course, that there is evidence in all, or

you may find that there is not evidence sufficient on any of them.

In this setting, it is my job to try to charge the law to you and it is your obligation to determine the facts from the testimony of the witnesses and from the exhibits which have been admitted into evidence.

As we have said before, you should certainly listen to the arguments made by the attorneys, but if you find whatever they said was not supported by the testimony of the witnesses, you are entitled to reject their argument.

You are to perform your duty without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. As far as any discussion of sentence or anything of that nature, again, you may consider what faced Darrell Debose by way of sentence to determine whether or not his testimony is believable, but as to this defendant, the law provides that it is your function to determine guilt or innocence

and it is the Court, - if you do find that a defendant is guilty to determine sentence. The appropriate sentence is not, as far as the law is concerned, not a function of the jury in this case.

Generally speaking, there are two types of evidence from which you may find the facts in the case. One is direct evidence. That is, the testimony of an eye witness. The other is circumstantial evidence, proof of a chain of circumstances pointing to the happening of certain events. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before you bring in a verdict, that you are satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In this connection, as far as dealing with circumstantial evidence, you are permitted to draw from one fact the existence of another if reason and experience support the inference. You may draw from facts which you find to have been proven such reasonable inferences as seem justified by

reason and logic in light of your own experience in life. An inference is nothing more than a deduction or conclusion which reason and common sense lead you to draw from facts which have been proven. Again, I will repeat, any inference which you draw from the evidence must reasonably flow from it and must be based upon facts established by the evidence.

If, in the course of your consideration of all the evidence in a case, you find that certain evidence admits equally of two inferences, one supporting innocence and one supporting guilt, you must accept the inference supporting innocence and reject the inference supporting guilt.

As far as objections are concerned, as I have explained to you before, it is the right of an attorney to make objections and as a matter of fact, sometimes it is his duty and my ruling upon them one way or another did not mean to indicate how I felt about the case, but as far as one particular question is concerned, it seemed to me it should be answered or it should

not be answered.

I have asked questions of certain witnesses during the course of the trial and I did this to the best of my ability in order to bring out facts which I believed were not fully covered in the testimony. The mere fact that I asked the question does not give any greater validity to the answer given. Again, you are to apply the same rules as far as the believability of the witness to those kind of questions as to the questions given or put by the attorneys in the case.

I told you before that arguments of counsel are not evidence. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you may consider that to be a fact just as if it was testified to by a witness. I may have, - I do not recall specifically, - I may have taken judicial notice of certain facts and if I have done that during the course of the trial, you may consider those facts as evidence.

If I have sustained an objection to a

question or if I have directed that certain evidence be stricken, then you should disregard it during your deliberation, and certainly, as I have said again and again, anything that you have heard or seen outside of the courtroom, for example, if you were coming in and out of the courtroom and you overheard certain conversation between attorneys or witnesses or friends of witnesses or friends, - any of that material that you have heard outside of the courtroom you must certainly disregard it.

The fact that the United States is a party does not give any greater emphasis or weight to their case. You should treat both sides at the beginning of this kind of a case equally. That is, as far as the lawyers are concerned. Certainly, it does not, - it still means that naturally the Government must prove the elements of their case beyond a reasonable doubt.

There are certain, sort of considerations which you should keep in mind. During the course of the trial, there were a number of photographs shown. The fact that some

agency, the police or someone else may have had a picture of the defendant should not, in any way, be considered as any evidence against him at all. Simply because the police have a person's picture does not mean that he has ever committed a crime before or since. There is absolutely no connotation of guilt of any kind simply because some pictures of the defendant were in possession of the police.

The defendant here, Maurice Burse, is not on trial for any act or conduct not alleged in the indictment. Sometimes, and I do not see it in this case, but sometimes in some cases, the jury, when they look at the facts could say,"well, he didn't permit that particular crime charged, but he did other crimes and, therefore", and you cannot do that. If the Government charges him for bank robbery or larceny and proves that a defendant stole an automobile, then he must be acquitted because he can only be found guilty of the crime charged. If there are other crimes here that possibly you could have found, then you could not find him guilty. If you found that the Government

has not proven the case against him within the confines of the indictment, then you must find him not guilty.

Mere presence at the scene or near the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that defendant participated in the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In making up your mind as to the facts in the case, you must weigh carefully, the testimony given by the witnesses. In that regard, you should keep in mind that you are the sole judges of the credibility or the believability of the witnesses and the weight their testimony deserves. You should carefully scrutinize the testimony given by each witness, the direct and cross examination of each witness, the circumstances under which each witness testifies and every matter in evidence which tends to indicate whether the witness is worthy of belief. You should certainly keep in mind in weighing

the testimony of any particular witness the testimony given by other witnesses in the case, whether the testimony given by the others supports or contradicts the testimony of the given witness.

You may find that during the record in the case, that the witness may have acknowledged a criminal record or admitted other unlawful or reprehensible conduct or activity. For example, admitted lying in the past. You will cautiously and carefully weigh all such facts and circumstances to determine the effect, if any, that those facts and circumstances may have upon his or her believability. You may consider any bias or prejudice demonstrated by a witness or demonstrated hope of leniency or reward to be gained through testifying.

That is not to say, however, that because a given witness may be a rather unsavory character in some respects, that you may not credit his or her testimony on the stand. Judge each witness's intelligence, motive, state of mind and demeanor

and manner while on the stand. Judge any relation the witness may bear to either side of the case, the manner in which the witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence. The mere fact that the testimony of a witness is inconsistent or that there are discrepancies in the testimony does not mean that you must reject the witness's credibility. You must determine whether the inconsistency or discrepancy is a result of falsification or whether, on the other hand, it is the result of innocent miscalculation or inaccurate observation. If you find that any witness has lied with respect to any material portion of his or her testimony, you may disregard that portion which you find to be unbelievable or you may, if you desire, disregard the entire testimony of the witness.

You will, of course, determine whether or not the testimony of a given witness is inherently improbable or contradictory in view of the other evidence in the case.

I am not going to review all of the cross examination of all of the witnesses but I think that certainly, in this case, we had two mothers testify, Mrs. Debose and Mrs. Burse. Certainly, they have an interest in the well-being of their sons. We know that from human experience. On the other hand, that does not mean that they would not testify truthfully. It means that you must keep that in mind, that simple fact in mind when you are weighing their testimony. By making this remark, I do not mean to give any extra emphasis upon that fact, but as to each witness in this case, you will find they stood in sort of a special place.

Mr. Debose, for example, pled guilty. He is facing a sentence. Whether or not this fact in any way shaded his testimony, consciously or unconsciously, it is up to you to determine.

You should also keep in mind in weighing the believability and credibility of a witness the opportunity the witness had to observe a particular event, how near or

how far away they were, whether they were distracted by other events, what was the lighting, what was the opportunity to see. We have had here a situation where we have a problem of identification. This is a kind of testimony which must be very carefully scrutinized. You certainly are entitled to rely on your own common sense in weighing the probity of identification testimony.

The longer, the more contacts we have with an individual, the more times we see him, we know the greater the reliability of our identification. If we live with someone for some period of time, and then they would go away for four or five years and put on weight, change their hair style or something, well then, we may have difficulty identifying that person, but if we see the person day in and day out and he remains about the same as far as height, weight and so forth is concerned, then our identification judgment would be given greater certainty, so these are the kind of things in this case, whether or not the

witness C who testified about seeing a particular person, in this case Mr. Burse. We have, of course, the problem of Mrs. Debose, whether or not what her opportunities were to make a judgment that this was, in fact, Maurice Burse, how she came to the conclusion. These are things which you must wrestle with.

We have the problem also of Mrs. Ramos who saw the young men running through her yard. Her opportunity to observe, the fact that she had, - whether or not she had seen him on other occasions, how often she had seen him. You should keep in mind not only her testimony, but the testimony of all the other witnesses in arriving at a conclusion as to whether or not this identification testimony is reliable.

You, ladies and gentlemen, are not obliged to accept testimony in a case even though the testimony is uncontradicted and the witness is not impeached. You may decide because of the witness's bearing and demeanor or because of the inherent improbability of testimony or for other

reasons sufficient to you that such testimony is not worthy of belief.

On the other hand, the Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of an essential element of the crime charged if you believe, beyond a reasonable doubt, that the witness is telling the truth. That does not mean that you have to believe each witness beyond a reasonable doubt. It means that from all of the mix of all of the witnesses' testimony, if you should come to that conclusion, the Government has proven its case beyond a reasonable doubt. That is sufficient.

In other words, ladies and gentlemen, in evaluating the testimony in the case, we are not concerned with quantity of witnesses on one side or the other. We are concerned with the quality of their testimony.

The law does not require the prosecu-

tion to call all the witnesses, all the persons who may have been present at any time or place involved in the case or who may appear to have some knowledge of the matters in issue at the trial, nor does it require the prosecution to produce all the exhibits which they have available. However, in judging the credibility of the witnesses who have testified and in considering the weight and effect of all the evidence that has been produced, you may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available. In this respect, it comes to this, the Government is not obliged to call all of the witnesses that are available, for example, in the bank, if there were other customers, other tellers, bank officers and all the rest of the people who were around there. On the other hand, if you should find that there were some witnesses who had essential information in the case and under the circumstances was something that the witness

was readily available to the Government and not to the other side and if the Government failed to call a witness, then you may consider that in your evaluation of all the testimony in the case.

In this case, there has been some evidence, as a matter of fact, there is no question about it. The defense lawyer spoke with one of the Government witnesses prior to the trial while that witness was incarcerated in Erie County Jail. There is nothing improper about a contact between a Government witness and a defense attorney in the case. It is perfectly proper for an attorney for the defense to contact and talk to a witness in the case and there was nothing wrong in this case for Mr. Stephens to visit with, discuss the case with Mr. Debose while he was in the County Jail.

As I have already told you, you are, and may consider the fact that Darrell Debose on a prior occasion has pled guilty to determine how much weight you should give to his evidence, but the fact that he has pled in no way is any evidence of any crim-

inal conduct on the part of Mr. Burse and ir that connection, you should keep in mind tnat a person like Mr. Debose who has admitted the commission of the crime, this particular crime, which we are discussing here today, that his testimony must be received by you with great caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of a person such as Mr. Debose, unless you believe that unsupported testimony beyond a reasonable doubt.

You may also, in your consideration here of the testimony of Evon Wright, whether or not, - she hasn't admitted any criminal conduct, but under the circumstances, you may find that she was aware that a certain crime had been committed, she knew about it. You may find that when the F.B.I. questioned her about it, that she did not reveal any information under circumstances, when it was her duty to do so, and in discussing these, I want to say to you, clearly, that it is your job to determine whether or not that is so. but if you find

that she was fearful that she might have been charged with a particular crime, then in evaluating her testimony, to determine how much weight you should give to it, you may consider these factors.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of a witness and not to establish the truth of these statements. It is your province to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to disregard such witness's testimony in all the particulars, or you may disregard all the testimony of that witness or give it such credibility as you think it deserves.

In this case we had a young man, age, I believe, eleven or twelve, testify, and

as I told you before, that a child is not disqualified as a witness simply because of his youth. There is no precise age which determines a person's competency. This depends on his capacity and intelligence, on his understanding of the difference between truth and falsehood and on his appreciation of his duty to tell the truth.

As with the other witnesses in the case, you are the sole judges of the credibility of Michael, - I have forgotten his last name, - of the young man who testified. You may consider not only his age, but his demeanor on the stand, his capacity to observe facts and to recollect them, his ability to understand questions put to him and to answer them intelligently, whether he impresses you as having an accurate memory and recollection, whether he impresses you as a truth-telling individual and any other fact and circumstance which impresses you as significant in determining his credibility. On the basis of your consideration, you may give his testimony such weight as you, in your judgment, think it

it entitled to.

Ladies and gentlemen, at this time, I will turn to the specific counts in the indictment. Count 1 is the conspiracy count. Right off when this indictment is sent to you, you will see the names of Maurice Burse and Darrell Debose in the same charge. As I have explained to you before, the fact that Mr. Debose's name appears there is a matter of form only. It has nothing to do with the guilt or innocence of Mr. Burse, but they were indicted together because this particular, - that would be according to the rules and the Government has followed the proper procedures here as far as laying this out in a technical manner.

Now, in summary form, Count 1 charges defendants with a conspiracy to violate Section 2113(a) and (b) of the Bank Robbery Statute by agreeing to take a sum of money from the Manufacturers and Traders Trust Company at the Ridge Road office in Lackawanna, New York. In this connection, you should keep the following in mind:

A conspiracy is an agreement by two or more persons to accomplish some unlawful purpose. Each member of a conspiracy becomes the agent of every other member. The agreement does not have to be in writing and the evidence need not show that the members entered into any express or formal agreement or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was or what the details would be.

However, the evidence must show that the members, in some way, positively or tacitly came to a mutual understanding to try to accomplish a common, unlawful plan. However, mere association or similarity of conduct and the fact that defendants may have known each other and may have assembled together does not necessarily establish proof of the existence of a conspiracy.

Before the jury can find that the defendant has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that defendant knowingly had knowledge of the purpose and

willfully participated in the unlawful plan with the intent to advance the object of the conspiracy. In this case, of course, the robbery and the taking of money from the particular bank.

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to accomplish the purpose of the conspiracy so that if a defendant with understanding o the unlawful plan intentionally encourages or assists in its accomplishment, he there becomes a knowing and willful participant.

If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and willfully formed and that the accused knowingly and willfully became a member of it and then one or more of the conspirators knowingly committed in furtherance of an object of the conspiracy one or more of the Overt Acts charged then the elements of the crime of conspiracy are satisfied and whether or not the partners accomplish their purpose is immaterial.

By the term Overt Act is meant any

act committed by one of the conspirators in an effort to accomplish some purpose of the conspiracy. The Overt Act need not be criminal in nature, but may be a completely innocent act. It must, however, be an act which tends toward the carrying out of the plan and must be knowingly done in furtherance of the purpose of the conspiracy charged.

In this case and in any case as far as conspiracy is concerned, it is the plan that we are concerned with, the criminal plan followed by at least one Overt Act. Whether or not, generally speaking, in a conspiracy, people can be charged with a conspiracy even though the purpose of the conspiracy failed so that you have to find evidence in the case that the conspirators ahead of time talked together, not that there was any formal writing, as I have explained to you, but they talked together and said, "Now, this is what we want to do. We will rob a bank. You do this, you do that and we will get together and do certain things". In this case, and it is not my object here

to sum up all the evidence on one side or the other because both attorneys here, Mr. Stephens and Mr. Skretny, I believe, have done a very commendable job in putting to you their respective contentions here, but I believe, under the circumstances here, you must be, - approach this particular thing with this in mind. The man here who testified about the plan was Darrell Debose and when you weigh and evaluate his testimony as far as the conspiracy count is concerned, you must, of course, keep in mind the other instructions which I have given to you about how to size up a witness and to determine how much weight you should give his testimony.

Certainly, if, in fact, certain Overt Acts were committed and you believe that the defendant here participated in the Overt Acts, you may consider that as to that portion of the conspiracy charge, but before you can find a man guilty of conspiracy, you must find that not only the Overt Acts were committed, but also that the before there was participation that in the evidence

in the case that there was a plan. To sum up again, in order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt first, that the conspiracy described in the indictment was formed and existing at or about the time alleged. Secondly, that the accused knowingly and willfully became a member of the conspiracy. Thirdly, that one of the conspirators, thereafter, knowingly committed at least one of the Overt Acts charged in the indictment at or about the time and place alleged, and fourthly, that such Overt Act was committed in furtherance of some object or purpose of the conspiracy as charged, and as I started out, I will end up by saying that these elements must be proven beyond a reasonable doubt.

Now we will turn to Count 2 of the indictment. In summary, Count 2 charges that on or about the 30th of July, 1974, that the defendant Maurice Burse did take and carry away with intent to steal and purloin money from the Manufacturers and

Traders Trust Company, Ridge Road Office, Lackawanna, New York, which was organized and operating under the laws of the United States and a member of the Federal Reserve System.

The particular statute we are involved with here is 2113(b) which provides in part whoever takes and carries away with intent to steal or purloin any property or money or any other thing of value exceeding $100 belonging to or in the care, custody, control, management or possession of any bank shall be guilty of an offense against the United States.

In this particular count, you will note that the amount of money charged was some $410. The Government must prove an amount over $100, but they are not obligated to prove exactly $410.

In order to prove a violation of this particular section and this particular charge, the Government must prove the following elements beyond a reasonable doubt.

Number one, that the money was taken and carried away by the defendant Maurice

Burse; that this was done with the intent to steal or purloin; that the amount of property or thing of value exceeded $100, and that it was in the possession of a bank which was insured under the provisions of the Federal Deposit Insurance Corporation.

To resolve that question, you will remember the testimony of the officer who had the certificate and so forth.

Turning to Count 3, Count 3 of the indictment in summary form charges the defendant, that on or about the 30th of July, 1974, the same bank, did take by force and violence and by intimidation from the teller Helen Jurek, certain money of the bank which was operating under the laws of the United States and a member bank of the Federal Reserve System. 2113(a), the appropriate part reads that whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another any property or money or anything of value belonging to or in the care, custody, control or possession of any bank, as described in the statute, again

the Federal Deposit Insurance Corporation, shall be guilty of an offense against the United States.

In order to prove this violation, the Government must prove the following essential elements beyond a reasonable doubt:

That the defendant took from the named teller, money belonging to or in the care, custody, control, management of the bank; that the act of taking the money was by means of intimidation.

In this case, I mentioned force or violence before. That is in the statute but in this particular case, we are only charging that the money was taken by intimidation so that that is all we are concerned with. There is no need to prove any force or violence, only intimidation; that the act was done willfully and that the deposits were insured by the Federal Deposit Insurance Corporation.

In this regard, there are certain definitions which you should keep in mind. The word "intimidation" means to make fearful or to put in fear. Such fear must

arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim. However, the fear of the victim need not be so great as to result in panic or hysteria. In other words, in our own common sense every day life, if somebody said, "I was afraid", I mean if you had a close call in an automobile accident and you said, "I was afraid", that would be under the statute sufficient.

In all these cases, it is a basic rule that the Government must prove its case beyond a reasonable doubt. It is a basic rule that a defendant is presumed innocent until his guilt is proven beyond a reasonable doubt. The presumption of innocence remains with him throughout the trial and continues to exist until each juror is convinced beyond a reasonable doubt by legal and competent evidence that a defendant is guilty of the offense charged. This burden of proving guilt beyond a reasonable doubt rests with the Government at all times. It never shifts to the defendant.

The Government must prove each element

of the crime charged in a particular count beyond a reasonable doubt.

You will separately weigh and determine the evidence as to each count in the indictment. You will determine the guilt or innocence of the defendant as to each count separately.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the evidence. It is rarely possible to prove anything to an absolute certainty. A reasonable doubt is not a vague, speculative or imaginative doubt, but it is such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves. A defendant is never to be convicted on mere suspicion, conjecture or surmise.

Since the burden is upon the prosecution to prove the defendant guilty beyond a reasonable doubt, a defendant has the right to rely upon failure of the prosecution to establish such proof.

You should make your judgment upon all the evidence in the case, direct, cross examination and the exhibits entered into

evidence. The law imposes no duty upon the defendant to produce any evidence. In this case, the defendant decided to produce some. That is his right. On the other hand, if there is some other evidence you might say, "I would like to hear this or that". He does not have the obligation to bring it out. It is the obligation on the part of the Government to do it and there can be no circumstances under which the burden can be shifted to the defendant to prove his innocence.

A defendant is under no obligation to give any evidence whatsoever. In this case, the defendant elected not to testify as a witness in his own behalf. Under our system, it is his right not to make such an election and take the stand. He could have if he desired, but he did not desire to. The fact he did not testify is not to be weighed against him in any fashion, nor is this fact, that is that he did not take the stand, even to be considered or discussed by you when you deliberate in the jury room. You should not draw any inference unfavorable

to the defendant whatever from the fact that he did not take the stand in this case.

As I have said to you before, the prosecution, the requirement that they must prove guilt beyond a reasonable doubt extends to every essential element of the crime charged against the defendant.

Your verdict in this trial must be unanimous. That is, all twelve jurors agreeing on a result.

As I said in the beginning, when you go to the jury room, you should deliberate carefully, giving your own reasoned view and listening to the reasoned comments of your fellow jurors.

If it should be necessary during your deliberation to contact the Court, only do so by sending a written note through the Marshal. Do not, - if you are called into court during any of your deliberations, do not tell me or anyone else how you stand numerically until you have reached a unanimous verdict.

It helps in the good conduct of your

business if you will select one of your members to act as foreman.

At this time, ladies and gentlemen, I will ask you to step out briefly with the Marshal so I can listen to any further requests or exceptions of the attorneys.

(Jury escorted from the courtroom.)

MR. STEPHENS: Your Honor, on behalf of the defendant Maurice Burse, we except to the failure of the Court to charge in the specific language requested with respect to all of our requests numbered 1 through 27. We additionally except to the failure of the Court to marshal the evidence and to summarize for the jury the contentions of both the parties that we requested in the beginning portion of our request to charge.

We further except specifically to the failure of the Court to charge the request on alibi taken from the pattern jury instruction which points out to the jury that even with respect to the alibi witnesses, if they don't believe them that that burden

of proof still stays with the Government.

We further except to your failure to charge the jury as we have requested that neither party is allowed to present specific bad acts or criminal conduct in impeaching a witness as long as we were by law prohibited from presenting that evidence which has been marked in Court Exhibits. We take the position that the jury should be told why the evidence is absent.

We further except to that portion of your charge where you instructed the jury about they should hold on to their own views, they should listen to each other and they should present their own comments on what the evidence showed, but then you went on to say that they should not hesitate to change their mind. Those words being in quote, "not hesitating to change their minds", at least from my notes. The position of the defendant is that they should very, very steadfastly hesitate to change their mind if they have a reasonable doubt.

THE COURT: You are taking it out of context, Mr.

Stephens, but you may state your exception.

MR. STEPHENS: All right. I just wanted to state the exception. A further exception, your Honor, in discussing the parties said that both the sides start out even and you said, I think, inadvertently, "In the beginning of this case", or "In the beginning of the case that they are equal". We except to that comment with respect to the beginning. We say that that is true throughout the case. We except to the portion of the charge that seems to indicate that the jury may convict the defendant of conspiracy on the basis of an Overt Act committed by the witness Debose. We make a request with that and I will get to the requests now. That is the end of the exceptions. On the requests, we request you to charge specifically that the jury is entitled to give the testimony of the witness Pierce no weight at all if they should determine that that is what it is entitled to. At the end of the instruction on child witness, you said that the jury was entitled to give his testimony such weight as they felt

it deserved. It may be splitting hairs, but I request that you also charge that if they make such a determination, they are entitled to give such testimony no weight at all.

We further request that the Court charge the jury that if they find that Overt Acts were committed by the witness Debose but it has not been shown beyond a reasonable doubt that the defendant Burse was involved in any conspiratorial plan, then they must acquit our find not guilty the defendant Debose. I am terribly concerned - -

THE COURT: The defendant Burse.

MR. STEPHENS: Or the defendant Burse, excuse me.

THE COURT: Mr. Stephens, I emphasized that they could not find Mr. Burse guilty of a conspiracy if they found that even if he committed one of the Overt Acts, they must find that beyond a reasonable doubt he joined the conspiracy knowingly ahead of time.

MR. STEPHENS: I think - -

THE COURT: Go ahead, you continue.

MR. STEPHENS: There also was, and this will probably come under an exception, there was an inadvertent slip of your Honor's tongue, according to the way I heard it, when you started to talk about the defendant's right not to take the stand and I believe, but subject to the frailties of my hearing, you said, "His right not to make an election to take the stand", which had an additional "not" in there, and I think served to confuse. The remainder, the rest of it was, of course, according to the, - we except to that portion, if that is what the record indicates was said. That is the end of our exceptions.

THE COURT: All your exceptions are noted.

MR. STEPHENS: We have one other point, your Honor. Your Honor, at our request and after considerable argument on the part of the defendant, your Honor determined that you would not charge the jury on aiding and abetting and with that decision which we requested, we heartily concur, but now the state of the record is such, your Honor, that the charge to the jury is that

the jury, with respect to Counts 2 and 3 must find that the defendant Burse carried away and stole and purloined money and with respect to Count 3, that the defendant Burse intimidated, - not force and violence, but by intimidation took from the custody and control of the bank. There is no testimony in this case that would support such a conclusion with respect to Counts 2 and 3.

THE COURT: I will leave it with the jury. All your exceptions are noted and in addition, I will deny any further requests.

MR. STEPHENS: Thank you, Judge.

MR. SKRETNY: Judge, we have - -

THE COURT: Mr. Skretny.

MR. SKRETNY: Just one exception and that is with respect to Counts 2 and 3 and the way your Honor addressed yourself to the jury with respect to those two counts.

Your Honor specifically indicated to the jury that they must find that Maurice Burse, in fact, carried away the money with respect to Count 1 and did the intimidation with respect to Count 3, -

I mean Count 2 and Count 3. We submit that the plain reading of the indictment, and this is in the nature of a request, is that Darrell Debose and Maurice Burse in concert did what is set forth in Counts 2 and 3 and that the jury should be made aware of that.

THE COURT: I have made my ruling on that yesterday and I will adhere to it.

MR. SKRETNY: It is different from an aiding and abetting. We submit it is an in concert act as joint principals, as opposed to an aider and abettor under the specific aiding and abetting provision.

THE COURT: I will leave it as it is. Have the jury come back.

(Jury returns to the courtroom.)

THE COURT: I should mention to you, ladies and gentlemen, in a few minutes, Mr. White will bring down to you the exhibits which have been marked in evidence. They will be there for your perusal. You may find that there are, - we know there is some material which

is marked as exhibits, but which was not introduced into evidence. That will not be sent to you and if it is not sent to you, you should not guess or surmise about what is on it. Some of these materials, if they were not marked in evidence, there was testimony about, and, of course, you can consider what the testimony was. Mr. Gray and Mrs. Miller, because we can only have twelve jurors, you are now excused. We will ask you to call this evening. We think we will select a jury tomorrow morning, but we are not sure and if you will call this evening, - do you have the slips that indicate the numbers, - you have the phone number to call the Clerk. Call sometime after 5:00 o'clock and we will then be able to tell you whether or not to come in tomorrow morning or not. Thank you again. You are excused. Will the Marshal step up and be sworn. You are excused for the day and you may walk out. We will only have a jury of twelve.

(Two alternate jurors excused.)

(One male and one female Deputy United States Marshals sworn as custodians of the jury.)

THE COURT: All right, ladies and gentlemen, you may go with the Marshals to begin your deliberations. Mr. Skretny and Mr. Stephens, you stay here and check with Mr. White so we are sure that only exhibits which ought to go to the jury go. We will be in recess.

(Recess taken at 10:43 a.m., pending the verdict of the jury.)

* * * * * * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* * * * * * * * * * * * * * * * * * * * * *

THE UNITED STATES

-v-

CR. 74-227

MAURICE BURSE,

Defendant.

* * * * * * * * * * * * * * * * * * * * * *

Summation of WILLIAM SKRETNY, Assistant United States Attorney, had and taken in proceedings of trial before the HON. JOHN T. CURTIN, United States District Judge, and a Jury, in Part I, United States Court House, Buffalo, New York, on September 30, 1975.

APPEARANCES: RICHARD J. ARCARA, United States Attorney, by WILLIAM SKRETNY, Assistant United States Attorney.

R. WILLIAM STEPHENS, Esq., Attorney for the Defendant.

PROCEEDINGS: After recess, 3:55 p.m.

APPEARANCES: As before noted.

(Jury present.)

(Defendant present.)

MR. SKRETNY: Your Honor, Judge Curtin, gentlemen of the defense, Mr. Stephens, ladies and gentlemen of the jury:

I would like to begin by thanking each one of you for all of your time and attention and dedication during the course of this trial. At this time I would like to ask you to do a couple of things and it is in line and in light with what Mr. Stephens cautioned you about during his closing remarks. I too on behalf of the Government ask you to be careful in your deliberations and utilize for those deliberations only your common sense and your experience in terms of utilizing that with respect to the evidence which has been introduced into this case and I simply ask you to decide this case on the evidence which has been

presented to you by the Government during the course of the trial.

At this time my function as a trial lawyer draws to a close, just as it opened with an opening statement, it closes with a closing statement. My closing remarks to you are last because the Government has the burden of proving an individual's guilt beyond a reasonable doubt and it is our last opportunity to attempt to put the evidence into perspective with respect to this case.

Please remember, and you will be told time and time again, that what I say or what any attorney says or what the Judge says from time to time is not evidence in the case. You are only to consider the exhibits which have been received into evidence, the testimony you have heard from the witnesses and tne stipulations or the agreement which defense counsel and myself with respect to the parties have agreed to in this case and the Court has had read back to you during the course of the trial.

Before I actually get into a brief summary of the evidence in this case, let's first take a look at the indictment and again I point out to you that there are three counts in this indictment and you will be told a little bit more about Criminal Number 74-227. Let's examine the elements as they affect count one, count two and count three at this time and let's look at those elements that the Government must prove in light of the evidence or at least a short synopsis of the evidence which has been presented to you. We submit that your consideration of the evidence in light of those elements will be more than sufficient to establish guilt beyond a reasonable doubt.

Now, we are talking in count one about a conspiracy. Now, what does or what do we mean by a conspiracy? His Honor, Judge Curtin, will instruct you concerning the law that you are to apply with respect to the concept of conspiracy but briefly conspiracy is an unlawful plan or agreement to violate a criminal

law of the United States and some action taken by the participants in this conspiracy to further the act of that particular plan. Ladies and gentlemen of the jury, the law is clear. The Government need only prove that there were two or more individuals that agreed to do a particular unlawful act and in this particular case, the Government need only prove one of the overt acts. That is, one of the four acts that were set forth in the indictment and you will have that with you in the jury room. Overt act and number one, number two, number three, number four. If we prove one of the overt acts was actually satisfactory performed to your understanding beyond a reasonable doubt, that satisfies the Government's burden under the law.

Now, two things are important here. First we are dealing with the conspiracy. Now, a conspiracy or an unlawful plan can be either a formal or an informal agreement. When we talk about plan, when we talk about conspiracy, what we talk about

is something that appears to be a formal written agreement or document. That is not the entire picture. It can be an informal arrangement, a get-together, individuals getting together and discussing how they are going to go about doing a particular unlawful or illegal act. We submit to you that that exists here.

With respect to that same conspiracy count, we submit to you that three is not the all-important number in this case, although the proof establishes three participants beyond a reasonable doubt. We submit to you that the proof is sufficient with respect to the elements to establish the guilt of defendant Maurice Burse.

Now, let's briefly go over the evidence of the case as it affects count one of this indictment. Again, count one being the conspiracy. Pretty much leading off the Government's case Darrell Debose took the witness stand. You watched him. You have heard him, you observed him testify. We ask you to take

all your impressions into consideration including some of the remarks that you have heard by counsel in determining the credibility of witness Darrell Debose with respect to whether or not Maurice Burse, the defendant in this case, participated in the conspiracy and is guilty in addition to counts two and three in this case.

Now, Mr. Stephens pointed out to you that Mr. Debose is currently on the street but he also did point out to you that in fact when he conducted the interview in December of 1974 he was in Erie County Jail and we ask you to take that into consideration also.

MR. STEPHENS: I object to that because that inference that he seems to draw is not, and I will show and ask the Court to tell why he was in the Erie County Jail.

THE COURT: Ladies and gentlemen, the trouble is, Mr. Skretny, the reason Mr. Stephens brought it up is that Mr. Debose although he had pled guilty to one of the charges here, to the conspiracy, he has not

been sentenced yet; that he is still free to go about on his way. He was in jail, that is true, because evidently at that time suitable bail arrangements had not been made, but he was not sentenced. That is the only point we are concerned with here and that is the point that Mr. Stephens wanted to make during cross examination. He is still awaiting the sentence of the Court.

MR. SKRETNY: Thank you, your Honor. We will direct our remarks further to that point just briefly.

Let's talk about Darrell Debose. We are talking about an unlawful plan or agreement that the Government must prove beyond a reasonable doubt. What did Darrell Debose tell us? Darrell Debose told us that in fact he and defendant Maurice Burse and Gary Green met in School 12 park on July 29, 1974. School 12 park being located on Walnut Street right next to where he resided with Mrs. Debose and her husband. Darrell Debose told us further that plans were

discussed, who was going to do what, the next day when the robbery was to go down, I believe, to use his terminology. What were those plans? Darrell Debose, he testified, was going to enter the bank as was defendant Maurice Burse, and the lookout in this whole plan, this whole conspiracy, was to be Gary Green, the third member of the conspiracy.

What do we know with respect to that testimony? We know in fact that the testimony is true. Mrs. Darrell Debose took the witness stand and she told you about 8:30 in the morning on the following day Darrell Debose was at home sleeping and defendant Maurice Burse and Gary Green came over to her house and introduced themselves and waited for Darrell. She told you that as they were leaving together on the day of the bank robbery, that defendant Maurice Burse told her that they were going to Lackawanna to Bethlehem Steel for a job, and what else do we know that corroborates or proves that what Darrell Debose was saying is

the truth? We know that they went to Lackawanna. How do we know that? Evon Wright testified. She testified that the three individuals arrived at here apartment in the morning of July 30, 1974 and we know where that was. We ask you to direct your attention to the map and to the blowup and particularly to the diagram. If you look at the map and the blowup you will see where 40 Steelawanna Street is. You will see the location of the apartment of Evon Wright to the bank which was located at Wilks-Barre and Ridge Road. You will see how close they are. Also look and see where 6 Steel Street is and see how close that is. 6 Steel Street, we know from the evidence, being the home residence of the defendant Maurice Burse in this case, and see how close that 6 Steel Street residence is to 40 Steelawanna and also to the location of the bank which was robbed on July 30th 1974.

Now, we know also from Evon Wright's testimony that the individuals concerned,

Darrell Debose, Gary Green and defendant Maurice Burse arrived back at her apartment a second time in the morning of July 30, 1974 and we submit to you that utilizing your common sense and your experience and all of your experiences of life in weighing them in the terms of the testimony and the exhibits that you can determine and the proof will establish beyond a reasonable doubt that there was ample time to go from 40 Steelawanna to rob the bank which took place approximately between 10:00 and 10:30 and arrive back at the apartment of Evon Wright, 40 Steelawanna, before 11:00 o'clock in the morning on July 30, 1974.

Now, with respect to the overt acts in this conspiracy count, the first overt act was that which I just directed your attention to, the meeting at the home of Darrell Debose on Spruce Street on July 30, 1974. We submit to you that that is established beyond a reasonable doubt.

The next overt act involves the entering of the M & T Bank and there is really no dispute with respect to that. Simply stated, Helen Jurek testified that the bank was robbed, the bank was entered in order to be robbed and in order to have the photographs taken. Darrell Debose was inside the bank on that particular day. That testimony, that proof establishes overt act number two beyond a reasonable doubt.

With respect to overt act number three, and remember we mentioned four overt acts, overt act number three charges that in fact Darrell Debose, defendant Maurice Burse and Gary Green met at 40 Steelawanna Street on July 30, 1974. We know that. That is the case. That is the evidence. The only dispute there is when or was the money, the proceeds from the bank robbery actually split there, and finally, overt act number four utilizes counts two and count three of the indictment, the actual entering of the bank to commit the

robbery. In count three the robbery of the bank, the M & T Lackawanna Branch of the bank, by intimidation.

If the proof establishes beyond a reasonable doubt that the larceny, the theft of the moneys took place, - the theft took place by intimidation, and I submit to you that the proof is clear. In fact, there was a stipulation, an agreement that the teller was in fear. That is the intimidation and the Court will instruct you in terms of a further definition on what the law is with respect to intimidation.

If you believe the evidence, we submit to you that it is sufficient to establish those four overt acts beyond a reasonable doubt.

Now, with respect to count two just a couple of quick comments. Count two charges Darrell Debose and defendant Maurice Burse as acting in concert, as being principals in the theft of the approximately $410 from the M & T Bank on July 30, 1974. We submit to you that

there is proof beyond a reasonable doubt that they did act in concert, that they are principals with the theft of the approximately $410.

With respect again to the amount in question, $410, when you are in the jury room, look at the Government's Exhibits, look at the bait currency record and look at the teller cash sheet, the strike sheet which bears the name of Helen Jurek. It is Exhibit Number 12 received into evidence and Exhibit Number 8 received into evidence. Viewing those two exhibits, you will be able to see and we submit they prove that the amount taken was approximately $410 on July 30, 1974.

With respect to count three, again, Darrell Debose and defendant Maurice Burse are charged as principals, as acting in concert to take by intimidation the $410, and we submit to you that it is clear, it is stipulated, and recall the testimony of both teller Helen Jurek --

MR. STEPHENS: I object to, "it is stipulated",

your Honor.

THE COURT: It is up to the jury to determine what the evidence was about the amount of money.

MR. SKRETNY: With respect to the intimidation, and that is what we are talking about with respect to count three, Helen Jurek testified, "I was scared". Mr. Stephens stipulated that there was fear in Helen Jurek. Miss Jurek stated that this individual Darrell Debose wearing a dark jacket, the glasses, a hat, came up to her when she was coming back to her teller's cage, and what did he say to her, he said, "This is a holdup, hurry, hurry, give me all your money". Common sense will tell us under that set of facts, that use of language, that she would be afraid, and we know again from our discussion of the previous count that the bank was in fact robbed and there is no real dispute with respect to that. That primarily is a capsule summary of the elements as they are before you, ladies and gentlemen, as you must decide them in light of all the

proof that was presented; count one the conspiracy, count two the theft, count three, the theft by intimidation. We submit to you the evidence is sufficient beyond a reasonable doubt.

Now, let's take a look at what the defendant in this case would have you believe, and let's start off with Darrell Debose. The defendant would have you believe that Darrell Debose lied a number of times, and I wrote these down, three lies concerning his age, one lie about Evon Wright, or while at Evon Wright's place, and one lie to the FBI about Jimmy Barner.

Now, what the defendant is saying and wants you to believe is that because of those lies that you are not to believe Darrell Debose, and what the defendant is further saying is that the Government is a part of those lies because it agreed to allow Darrell Debose to make a plea to one five-year count of an indictment and not to the ten-year counts in the indictment.

Well, let's examine that reasoning just a little bit, just briefly at this point. Let's use our common sense with respect to that arrangement. His Honor, Judge Curtin, will instruct you that you should again utilize your common sense, your experience with respect to the arguments of counsel. Common sense will tell us, ladies and gentlemen of the jury, that a bank robber is not an ordinary individual, that he won't be like a choir boy that you might be thinking about or the defendant will have you believe should be up there telling you about a bank robbery. That is simply not true. The Government must take its witnesses as it finds them. It has no choice in the matter. Unfortunately, there are people who rob banks and it appears to be more and more people all the time.

MR. STEPHENS: Object to that, object to that now.

THE COURT: Excuse me. Mr. Knisley, my attention was diverted. I am sorry.

(The following was read by the

reporter:

"Unfortunately, there are people who rob banks and it appears to be more and more people all the time.")

THE COURT: As I told you, ladies and gentlemen, during jury selection we are not to be concerned here about what is happening in other places or other crimes. We are only to concern ourselves with the particular crime charged in this indictment. If what Mr. Skretny says is so, it is just to be disregarded. It just does not have any bearing on this lawsuit at all. There is a particular charge placed here and you are to direct your attention to that charge and determine from the facts in this case whether or not the Government has proven this particular charge beyond a reasonable doubt. The fact that somebody else on some other day, last month, last week, yesterday or last year robbed another bank certainly is evidently clearly no evidence whatever of any guilt on the part

of Maurice Burse in this particular case and you are to absolutely ignore it and to strike from your mind the remark made by Mr. Skretny.

Mr. Skretny, you may continue.

MR. SKRETNY: With respect to a bank robbery witness like Darrell Debose, thank God that there are some individuals like Darrell Debose who cooperate with the Government and make it possible for there to be effective law enforcement.

Now, whatever the reason, that is what you have to consider, but Darrell Debose did cooperate. He did testify and we submit to you he testified truthfully, whether it was to save himself from a possible harsher sentence for testifying truthfully against his partner or because of some spark of decency that maybe a good woman like Mrs. Debose may have instilled in an individual like Darrell Debose.

Let's take a second and just talk about Mrs. Ann Debose, and you observed her testify, you observed her while she

was on the witness stand. You are going to be donning the black robes. You are going to be asked to make determinations on credibility with respect to the proof in this case. Ask yourself what motive does Mrs. Debose have to lie. Does she have any motive whatsoever to lie? I submit to you none. She is not even the natural mother of Darrell Debose. She got up there and she testified, she told you the way it was on the morning of July 30, 1974.

What further do we know about Mrs. Debose? Let's look at her, let's view her as a person. We know that she doesn't allow crowds in the house and as a consequence of that, she is not familiar with Darrell Debose's friends. We know that and we know she is a good family woman because the only people she is concerned with, she testified and knew were her nephews, her family. We know that she was upset too with Darrell Debose's sleeping habits. Does that sound like a woman that would come in

here and lie? I ask you did she lie about the photographs, - confused, perhaps, but I think we all would undergo the same thing if we were asked to testify about what took place maybe a year and three months ago. It is a long time and to remember precisely and exactly what words were said and what photographs were shown is a difficult thing. I submit to you she may have been confused but certainly not lying, and that is your determination to make.

Doesn't it all boil down to this, with respect to the photographs themselves anyway. Now, remember the testimony that was read back to you because that is important. Think about it, discuss it. She said in her testimony, in my recollection, that the photos were not important to her except Darrell's. Darrell's was the important one, and doesn't that make sense? What else did she say? She said, "I didn't know the boys from the pictures". Well, that makes sense too. She said in response to Mr. Stephens' question,

"Sir, not by the pictures did I know the boys or the faces did I know the boys, but by the faces I knew them", and that is what it is all about, not by the photographs, by the faces, and she didn't have any hesitancy whatsoever. Mrs. Debose from Spruce Street in Buffalo, New York in picking out Maurice Burse as that individual that was there at 8:30 in the morning, that had a conversation with her, that said, "I am going to Lackawanna for a job at Bethlehem Steel with your son and with Gary Green." No doubt in her mind whatsoever,and I submit to you, ladies and gentlemen, that that is proof beyond a reasonable doubt.

The rest of all this what happened, how many photographs were submitted to you, what was precisely said, are you positive what was precisely said, that is all a smoke screen. That is all it is because the fact is it wasn't the photographs that were important, but it was the faces and she remembered the faces.

Now, let's get back to Darrell Debose

for a minute. The defendant through Mr. Stephens would have you believe that the Government did something wrong in agreeing to a plea to count one. Well, is it really so bad to allow a plea to a five-year count instead of a ten-year count. Sure, Darrell Debose would rather be shot, would rather die than spend ten years in jail. Probably everybody would feel the same about that, but what defendant didn't point out and what the Judge alluded to is the fact that Darrell Debose has not been sentenced yet and the Court can consider credibility of Darrell Debose in sentencing on the count he pled to. Do you really think that perjury and its effect on sentencing, small potatoes, to quote Mr. Stephens, to Darrell Debose, - no. The answer is obvious, ladies and gentlemen of the jury, and that's why the Government allowed the plea to count one and that's why Darrell Debose is telling you the truth.

Now, the defendant would have you believe that Darrell Debose is lying

because he lied on a number of times when the FBI was after him. Well, I submit to you an individual that did what Darrell Debose did, it would only stand to reason would not want to be involved and would lie to investigating agents, but when he has as much at stake here in terms of his credibility, that there is not that chance that he would lie again and that Darrell Debose was in fact telling you the truth.

You know, the defendant pointed out various things, and by the defendant I mean Mr. Stephens, to you with respect to actually what Darrell Debose didn't do and what he didn't testify about and where the conflicts were, but again I submit to you those are smoke screens because what he didn't tell you about and what is important here is the truth, and what in fact did Darrell Debose say. We know that there was a meeting at the house and that was corroborated. That was the truth. We know that they went to Lackawanna and by "they", I mean Darrell Debose, Maurice

Burse and Gary Green and we know that they went to Evon Wright's. We know that was the truth and we know that they left Evon Wright's and the bank was robbed and we know that was the truth and Darrell Debose told you all that. We know they came back to Evon Wright's, and that was the truth. We know that certain of those individuals, except for Darrell Debose, left for Evon Wright's and that was the truth. What I am saying to you is that the defendant didn't tell you about all the truths. He just picked out little inconsistencies --

MR. STEPHENS: I object to that.

THE COURT: Again, Mr. Skretny, as you know, as certainly we have talked about before, there is no burden upon the defendant in this case at all. It is absolutely wrong to say that the defendant didn't tell you about all the truths because the defendant does not have to offer any evidence whatsoever. The burden remains upon the Government to prove guilt beyond a reasonable doubt. That was an improper

remark and should be stricken and not considered by the jury.

MR. SKRETNY: I am sorry, Judge. I didn't mean to infer that.

THE COURT: Mr. Skretny, if I may make a suggestion --

MR. SKRETNY: Certainly.

THE COURT: Take your time.

MR. SKRETNY: Now, what in essence I am saying is that the defendant was commenting in the fashion that he did to make you look at the unimportant and not the important or to make the important seem unimportant and I think that is what we have to realize and what you have to realize in evaluating the evidence that is before you.

Now, the defendant through Mr. Stephens made reference to a signed statement. Well, that was a signed statement of Darrell Debose. Now, he said to you that Darrell Debose testified that Gary Green's name appeared in the signed statement. Well, it is true but it appears there only in this respect,

and you can look at that document. Only in the respect of saying --

MR. STEPHENS: Your Honor, I don't believe, - that document is not in evidence.

THE COURT: The statement given by Mr. Debose is not in evidence and you are not to speculate upon what is there. You may consider in your determination of the issues in this case that portion of Darrell Debose's statement which was testified about, but it is not in evidence and under the rules should not be in evidence and you should not guess about what else might be there.

Go ahead, Mr. Skretny.

MR. SKRETNY: Now, with respect to some remarks that Mr. Stephens made and asked you to observe these two photographs, one of an individual that has been purported to be or stipulated to be Gary Green, and the other one which is a photograph of Maurice Burse. Well, you know it is interesting and I ask you to consider this too, the defendant says the Government wants everything both ways, but look what

he has done. He has taken a photograph of Gary Green which Barbara Ramos said she never saw, "I never saw a photograph of Gary Green." She stated in her direct testimony that, "I didn't know Gary Green." This photograph indicates that Gary Green is approximately five foot six inches tall. No height on the photograph of Maurice Burse.

MR. STEPHENS: Well, that is not the defendant's fault. The defendant's counsel's fault, but the pictures are as we have them.

THE COURT: The pictures are as they are and as far as evaluating the effect of the photographs certainly you should take into account all the testimony of Barbara Ramos about them and any other witness who testified about them.

MR. SKRETNY: If you recall, there was testimony by Mrs. Burse that allegedly Maurice Burse was five foot ten or five foot eleven and Mr. Stephens tried to get Barbara Ramos to say --

THE COURT: Mr. Skretny, we have Maurice Burse in the courtroom. We went through this

before. You also, ladies and gentlemen, are entitled to make up your own mind as to the height of Mr. Burse.

MR. SKRETNY: Well, I think I can at least call it to the jury's attention, your Honor.

THE COURT: Go ahead.

MR. SKRETNY: I ask you is Maurice Burse five foot ten or eleven as Mrs. Burse said he was or is he five foot six like Barbara Ramos said, and view that in terms of the fact that she said she never saw the photograph of Gary Green and that she didn't know Gary Green.

MR. STEPHENS: Your Honor, I am sorry, but I don't recall Barbara Ramos testifying anything about whether she had ever seen or heard or known Gary Green. It will be up to the jury to recall the testimony but --

THE COURT: It is up to the jury to recall her testimony in this case.

MR. SKRETNY: Now, with respect to Evon Wright, the defense would have you believe --

THE COURT: I think though that there is no question about the fact that that is a photograph of Gary Green that is in

evidence.

MR. STEPHENS: Right, your Honor.

THE COURT: Go ahead, Mr. Skretny.

MR. SKRETNY: That you are not to, with respect to Evon Wright, believe that she was telling the truth. Well, let's just look at Evon Wright's testimony. She testified again that there were two times when the three individuals were at her apartment on July 30, 1974. There were times when she was somewhat confused about the exact and precise times but we know it was in the morning, but she wasn't confused about which three boys were there. We know she received $10 and we know she received it from Spider or Darrell Debose, but you know, you have to look at the arguments that Mr. Stephens has made. There is no indication anywhere in the record, and using your common sense there is no reason why Darrell Debose couldn't have had $10 on his person to give to Evon Wright. The fact that she accepted the money is not a criminal act if you believe her that she did not know

that her apartment was used for a bank robbery.

We know she spent that money. We won't see that money again, but that is not unusual either because we know she was unemployed and that she had a little baby at the time.

You know, you have to again ask yourself this question, what motive does Evon Wright have to lie, and we submit to you none. She testified that no Government promises were made to her with respect to not prosecuting her for any possible criminal violations. She told you about the fact that Ken Burse was present in her apartment and I think that is important. She didn't lie to you on the stand and say Ken Burse wasn't there, but why would she tell you that now? There is no reason unless she was telling you the truth because had she not said anything about Ken Burse, nobody would have known about Ken Burse being there, but she was truthful.

MR. STEPHENS: Your Honor, I am not so sure that

that is so. That is speculation. That is not borne out by the evidence.

THE COURT: It is argument, ladies and gentlemen. If you do not find that the facts are supported in the evidence, then you should simply reject the arguments.

MR. SKRETNY: Also, and usually when a witness has a motive to lie, especially in a situation where one witness is involved either emotionally or in a relationship with another individual, that this witness lied because she was jilted or because there was some family action to make the relationship appear wrong or something to that effect, but there is no evidence that that type of relationship exists. We know that Evon Wright even to, virtually, the very day that she testified, was still seeing Kenny Burse and we know that Kenny Burse and Maurice Burse are not physically alike from terms of the testimony and by that I submit to you that there is testimony that Kenny Burse was seventeen years of age and Maurice Burse is twenty years of age. We know what the heights

were as testified to by Mrs. Debose and we know there is considerable difference in the heights.

Now, let's take a look at Barbara Ramos. What motive does Barbara Ramos have to lie, and we submit to you none. Counsel Mr. Stephens tried to make a big deal out of the fact that the individual or individuals concerned were black and that Barbara Ramos is white, but he didn't mention to you that Barbara Ramos testified that she lived for years in Lackawanna, that she worked in Lackawanna, that she went to the Friendship House in Lackawanna. Certainly her years of experience have enabled her to make the identification that Mr. Stephens said she couldn't make.

What do we know about Barbara Ramos and defendant Maurice Burse? We know that Barbara Ramos knew Maurice Burse from a bar in town she testified to, from seeing him around the neighborhood and from seeing him at the Friendship House and that's why Barbara Ramos could identify defendant Maurice Burse on the day of the

robbery when they were running through her yard, and remember what made that so meaningful. She was coming down the steps into the yard and these two individuals ran past her and she was brushed by the shorter one, Maurice Burse, while she was carrying her baby. Don't you think that would make her remember the fact that it was Maurice Burse who was running through that alley on the morning of July 30, 1974.

Now, something that Mr. Stephens didn't men tion which I think is important and which you should consider; when did Barbara Ramos next see defendant Maurice Burse. She testified that on September 19, 1975 she picked up a hitch-hiker and who was that hitchhiker, defendant Maurice Burse. What did Mr. Stephens try to get her to say that she asked Maurice Burse, she asked Maurice Burse what his name was. She wouldn't. She told you the truth. She said this, she said, "I know you, you are Maurice

Burse and I have to testify against you." Does that sound in your mind that there is any doubt with respect to how certain she was.

THE COURT: Ladies and gentlemen, I think I should say, and the burden should not be upon Mr. Stephens to interrupt all the time, that there was more to the conversation than that and you are to make up your mind upon this particular event from all of the conversation. Whether or not, maybe Mr. Skretny has correctly quoted a part of it and maybe he has not. It is your determination to make, but there was more to the conversation than that and you should make up your judgment on this event based upon all of the conversation that this lady related on the stand.

Yqu may continue, Mr. Skretny.

MR. SKRETNY: Thank you, your Honor. Now, with respect to Government's Exhibit Number 3 which was received in evidence, the inner diagram of the bank, much to-do was made about the fact that there was no photograph or image on the negatives of the

bank film. Well, remember a few things and when you have the diagram in the jury room, look at where the cameras are located. Just look at where they are mounted because the witnesses have testified that the angles are not necessarily accurate, but their positions on the mountings are accurate. Look at the area where the defendant Maurice Burse could have been in that lobby.

MR. STEPHENS: Well, I object to, "could have been". The only witness who says he was there has marked it with an initial where he was.

THE COURT: That was Mr. Debose who marked the initial on the map. You may have that in the jury room and make up your mind from that. As far as speculation where else he could have been it would seem to me it is speculation. You should make up your mind based upon the testimony in the case.

MR. SKRETNY: Now, remember a few other things with respect to the cameras in the bank. Remember Miss Jurek testified and she

said the camera is not activated until you pull out the bank money or the bait money. We submit to you that the reason why Maurice Burse's photograph was not on the film was because after the bait money was pulled, the cameras were only activated at that time, a time when Maurice Burse was no longer in the bank.

MR. STEPHENS: Now, that is the purest of speculation, your Honor.

THE COURT: All right. I think, ladies and gentlemen, that Mr. Skretny, - it is up to you really, ladies and gentlemen, to determine the facts in this case from the evidence but I believe that Mr. Stephens' objection here is well taken. I think that is simply speculation on Mr. Skretny's part and you should reject the argument.

MR. SKRETNY: I submit to you, ladies and gentlemen of the jury, if you consider the testimony of Evon Wright and Darrell Debose in light of the eye witness testimony of Evon, - of Barbara Ramos, together with the testimony of Mrs. Debose, that that will

be sufficient beyond a reasonable doubt for purposes of finding defendant Maurice Burse guilty as charged.

Now, let's just take a couple of minutes and I will wind up my remarks to you. With respect to the witnesses that the defense called in this case we know, and we have already commented that one of the witnesses was Mrs. Burse, the defendant's mother, and it goes without saying that her son is on trial and that you can consider her interest in testifying the way she did in your evaluation of her credibility.

Likewise with Craig Burse. What do we know about Craig Burse? It was attempted to give you the impression that it was Craig Burse that Barbara Ramos saw at the Friendship House and it wasn't --

MR. STEPHENS: I object to that. That wasn't it at all what was attempted. The only thing we say is that she said she had seen him at the Friendship House and we brought out that the boys that are at the Friendship House all the time are other

than the defendant.

THE COURT: Ladies and gentlemen, it is your recollection which counts and you will recall the testimony on this point here, Mr. Craig Burse testified about his participation in basketball and also either the extent of it or lack of it of his brother Maurice.

MR. SKRETNY: And just remember just how reluctant Craig Burse was to admit that defendant Maurice Burse could have played basketball at the Friendship House when Craig Burse was not there and I think that is an important consideration for you to consider.

Let's look at Louise Stevens, a witness that the defense didn't mention at all. We submit to you that is because she had nothing to contribute at all. Mrs. Stevens testified that she was under the influence of alcohol on the day in question.

MR. STEPHENS: Oh, I object. Well, withdraw it, she did say --

THE COURT: It is up to the jury to recall what

the witness said.

MR. SKRETNY: And she further testified that she was under the influence of alcohol today. We submit to you that in determining the truth of her testimony that you consider that fact.

I think it all boils down to this statement, ladies and gentlemen of the jury, if the Government has the facts by virtue of the proof --

THE COURT: Excuse me, Mr. Skretny, and ladies and gentlemen, it is your judgment to make and perhaps I am wrong, but I think she said that it is her practice to have some whiskey, as I recall, every day of the year; that she recalls that there were sometimes when she was under the influence of alcohol when she had some contact with the events or with the agents of this case. I do not recall her saying that she was under the influence of alcohol today. Now, whether she did say that she had some drinks before she came here, but whether or not she was under the influence and whether or not that had

anything to do with her recollection of the events that she testified to, it is up to you to determine based upon the direct examination, the cross examination, and how her testimony squared with all of the other testimony in the case.

Mr. Skretny, you may continue.

MR. SKRETNY: Thank you, your Honor. Ladies and gentlemen of the jury, it pretty much all boils down to this, if the Government has the facts in the case by virtue of the proof, a defendant will argue that the Government's case is deficient on the law. If the Government has the law on its side, the defendant will argue the Government's case is deficient on the facts. If the Government has both the facts and the law going for it, the defendant is going to say that all of the Government's witnesses are lying and that's what we have here. We submit to you --

MR. STEPHENS: Judge, I object to this. I don't see where it advances the search for the truth or helps to claim that the defendant would do this and that if the circumstances

were different, just seems to me to label this defendant on the basis of Mr. Skretny's experience with other defendants. It brings in a whole panoply of objectionable ideas for the jury to consider.

THE COURT: We are to consider only the facts, the law and the argument made in this case. What may or may not be argued in another case is just beside the point.

MR. SKRETNY: Ladies and gentlemen of the jury, I simply urge you not to be swayed by smoke screens, to simply consider the evidence that has been presented with respect to defendant Maurice Burse.

I have no stories, no humorous tales no quotes, no anecdotes to tell you at this point. Simply I urge you to consider the evidence presented to you and I submit to you that it will be sufficient beyond a reasonable doubt with respect to the guilt of defendant Maurice Burse.

Thank you.

THE COURT: Ladies and gentlemen, we will now be in recess until tomorrow morning.

I wonder, could we start tomorrow morning at 9:30? Is that agreeable to all of the jurors, that everyone can be here conveniently at 9:30? All right. Then tomorrow morning go to the jury room a few minutes before 9:30 and I hope to be able to start the charge in this case promptly at that time. Remember all my former, my prior instructions to you. Do not discuss the case with your fellow jurors or with anyone else. Do not talk to your fellow jurors at this time because you should wait until after I have charged you on the law in this case before you begin to talk about it with them, deliberate with them, and only do that in the jury room and certainly do not talk to others about it.

Spectators, stay in your places, please, while the jury goes out with the marshal. We will be in recess until 9:30.

(Jury escorted from the courtroom.)

THE COURT: Mr. Burse, it is most important that you are here tomorrow early. I know that you had an unfortunate problem this morning where your automobile broke down, but you plan your day so you are here tomorrow at ten minutes after 9:00 so that we can start promptly at 9:30.

THE DEFENDANT: Yes, sir.

THE COURT: Anything else before we recess?

MR. STEPHENS: Yes. Your Honor, on the basis of the closing argument of the Assistant United States Attorney in this case, the defendant moves for a mistrial based on all of the things to which we objected, and in addition, those things where your Honor interrupted the summation and more specifically on the question of referring in the presence of the jury to more and more bank robberies these days and the defendant didn't tell you with respect to the right of the defendant to remain silent and not to take the stand, it seems to me that was a comment that could have been interpreted that way --

MR. SKRETNY: I made no such --

MR. STEPHENS: Maybe made inadvertently --

THE COURT: Wait a minute, Mr. Stephens. I don't know if you referred to that. You didn't refer to that correctly, I don't think, the fact that he didn't take the stand. I mean this was the business about the defendant or his friends did not go to the --

MR. STEPHENS: No, there was at one point where I interrupted where the quote is as near as I can get it, "Defendant didn't tell you that such and such", or something, and I objected and the objection was sustained, but to the extent that that could be interpreted as a comment by the prosecutor, and the cases are quite legion on the subject, of the defendant not taking the stand, we move for a mistrial or in the alternative ask that not only you give the instruction 12.10 as we have requested, but that you also charge the jury that the defendant failing to take the stand is not something that they should even mention in their deliberations to each other.

THE COURT: I intend to, Mr. Stephens. Mr. Skretny, I think that the arguments, the points made by Mr. Stephens here are troublesome ones. I find also that from the whole history here of the times during the summation when improper remarks were made either through mistaken reference to the evidence or to other things where we had to interrupt, make this particular argument one where perhaps the relief that Mr. Stephens has requested is something which I certainly seriously ought to consider.

Mr. Stephens, what I would like to do, we have, of course, the full impact of the summation which I think it is very difficult to call this from the curb and I think I would like to reserve decision on it and put the case to the jury. Would that be agreeable to you?

MR. STEPHENS: As your Honor wishes, yes, your Honor, without waiving our rights to raise it at a later time.

THE COURT: All right. I will reserve decision on it.

MR. STEPHENS: Thank you.

THE COURT: We will be in recess until tomorrow.

MR. SKRETNY: Will there be a jury selection tomorrow?

THE COURT: No, not tomorrow, Mr. Skretny. We will stay with this case. We are going to notify the jurors who are on call to call back tomorrow so that there may be a jury selection on Thursday, but not tomorrow. We are going to continue after the summations in this case with two hearings in which Mr. Burns and Mr. Wagner are involved.

(Recess taken at 4:47 p.m.)

I hereby certify that this record is a true and accurate transcript from my stenographic notes in this proceeding.

Official Reporter
U.S. District Court

* * * * * * * * *

PROCEEDINGS: October 31, 1975.

APPEARANCES: As before noted.

(Defendant present.)

THE COURT: We are here this morning in the case of United States against Maurice Burse, Criminal 1974-227, for the Court to consider oral argument on the defense's motion for a judgment of acquittal pursuant to Federal Rules of Criminal Procedure, Section 29(c), and for a new trial under Federal Rule of Criminal Procedure, Rule 33.

I understand, Mr. Stephens, that your motion for a mistrial made during the trial of the case has been withdrawn.

MR. STEPHENS: Yes, your Honor. We have withdrawn that motion as stated in our brief and we filed the paper in the clerk's office yesterday and served it on the United States Attorney's office and we withdraw that motion, and so no one can claim that we are sailing under false colors, I will tell you why and the position that we

880

take.

THE COURT: I don't know if you have to tell me why, but I would be interested to know. I think, Mr. Skretny, why don't you be comfortable for a minute because since the burden is upon the defendant in this stage because, as you correctly point out, since a verdict of guilty has been voted here by the jury, the Court must consider the evidence in the light most favorable to the Government.

MR. SKRETNY: Your Honor, I have one motion I would like to make before taking my seat in this case. It is with respect to the filing of the brief in this case. Our office received a copy which I assume was filed yesterday.

MR. STEPHENS: My brief was late. I am sorry.

MR. SKRETNY: The brief was due on Monday. We move that it be stricken on the ground that it was untimely filed.

MR. STEPHENS: I have no objection if he wants to file another one in answer to it, your Honor.

THE COURT: If you feel that a response will be

necessary, Mr. Skretny, I will give you an opportunity to do that after we listen to oral argument here, but I do know this, that Mr. Raichle is out of town and Mr. Stephens has the burden of preparing a complicated case we are going to start next Tuesday.

MR. STEPHENS: Yes, and I had to be in New York on Tuesday and I didn't get the brief finished.

THE COURT: I know that he has other things that I believe satisfactorily excuse the filing, so I will excuse it and also give you time.

MR. SKRETNY: Thank you.

THE COURT: Mr. Stephens.

MR. STEPHENS: With respect to the withdrawal of the mistrial motion, your Honor, we take the position that since the jury in this case acquitted on counts two and three and since there has been no ruling on the mistrial motion when we made it, that we will take the benefit of that and we will hereafter in this case take the position that the defendant cannot be

retried on counts two and three because jeopardy attached under the Sixth Amendment and he has been found not guilty.

With respect to our motion for a new trial we incorporate in that motion all the claims of prejudice that we made in our mistrial motion as additional grounds as to why a new trial should be granted under Rule 3, but a new trial as we see it under count one only, and we will take the position most respectfully, of course, that the Court even now cannot nunc pro tunc, as we see it, go back to the time we made the mistrial motion and declare that trial a nullity with respect to all counts. We will take the position that with respect to counts two and three, the verdict is binding and that with respect to the prejudice that we claim he was prejudiced on count one and he was not prejudiced on counts two and three.

THE COURT: Excuse me, Mr. Stephens. Before we go further, is there anything you want to say about that, Mr. Skretny, about

Mr. Stephens' position?

MR. SKRETNY: Your Honor, we take the position that that is certainly inconsistent. What it amounts to is a viewing most favorable to himself in terms of how he wants to argue the question of prejudice. If there is prejudice, we take the position that it should be made applicable to all three counts. We indicate to the Court that we don't feel that there is any prejudice here and I think our brief makes that clear.

THE COURT: I am just talking about the procedural position here that during the trial a motion for mistrial was made. At that time the Court took it under consideration and did not rule upon it.

MR. SKRETNY: Procedurally, I believe that is correct. It was deferred in terms of your Honor's opinion with respect to that motion.

THE COURT: Now Mr. Stephens, at this time says, "Your Hcnor, I withdraw the motion", and he has explained his reason. Let me explain to you as I see my difficulty

here. In looking at cases and reading cases, and I cannot cite any cases to you, but it occurred to me that when motions for mistrials are made that they are, - in my reading they are usually denied or they are granted at that time and I believe here that there is merit to Mr. Stephens' argument because when you think of the quite strict rules of double jeopardy, - in other words, a man should not be put to the test twice for the same charge, that by following this procedure saying "Well, I will hold this off", then Mr. Burse had to wait here, had to worry about what the jury was going to do and then we had the jury verdict.

I suppose that it could have redounded to his benefit in this sense that if the jury had convicted him on all counts, then I suppose Mr. Stephens would say "Judge, in addition to these two motions that I urge now, I also want you to consider the motion for a mistrial."

I believe that motions for mistrial

on further reflection that I probably should have granted or denied the motion so everyone would have known exactly how they stood at that time and were not put to, - you would have known, - you would have been able to determine if I denied the motion that as far as the trial of the case, you would be able to urge various points that maybe you felt, "Well, the Court, I don't have to worry about this", but I think that there is merit to Mr. Stephens' argument now and since we have heard from the jury that in spite of what was claimed to be the prejudicial remarks during argument, and in spite of the arguments that Mr. Stephens urged which he claimed were prejudicial to his client, that in spite of those things, nevertheless, the jury acquitted his man on two counts, so that now for me to say in spite of the prejudice we are going to grant the motion for a mistrial and that would put him to the test again and leave it to another jury to wrestle with these, so I think he is

entitled to withdraw his motion for a mistrial and that we would consider only the motion on Rule 29(c) and 33.

Mr. Stephens.

MR. STEPHENS: All right. Next, your Honor, we move,- we have made a motion. It is in our motion papers, a motion for a judgment of acquittal under Rule 29(c). I don't think that there is anything in the record here that would justify a favorable,- I don't think the Court could say as a matter of law that the defendant should be acquitted, so I just in reflecting on the record and in writing the brief, I don't think that the 29(c) motion, - it was put in there to cover my flank, but I don't urge that.

We are really here on two bases, your Honor, a new trial on count one under Rule 33 or in the excercise of this Court's supervisory power in the interest of justice an order dismissing the indictment without prejudice because of the history of this case as outlined in the brief and outlined in all the papers filed

in the case from the indictment through the verdict.

Now, we start, your Honor, with citing the case of Berger vs. United States, an old case, 1935, and one of the things that was important in the case of Berger vs. United States was that the case against Berger, the court says, was not strong, and from a careful examination of the record, we agreed. You could substitute Burse's name here. Indeed, the case against Berger, - substitute Burse, - who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak, dash, depending as it did upon the testimony of Katz, substitute Debose, an accomplice with a long criminal record. With Debose ycu might say short criminal record with respect to felonies, but long criminal record with respect to misdemeanors and arrests. The Berger case also sets forth the obligations and duties of the United States Attorney in quite some

detail.

The United States Attorney is the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern in partially is as compelling as its obligation to govern at all, and whose interest therefore in criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor. Indeed, he should do so, but while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one, and then the Court goes on to say it is fair that the average jury in greater or lesser degree has confidence that these obligations which so plainly

rest upon the prosecuting attorney, will be faithfully observed.

Now, what has happened in the case of United States vs. Maurice Burse, your Honor, we start off with an indictment which we now know was based entirely on hearsay. In spite of the fact that the cases in this circuit reviewing the practice and Costello vs. United States to the contrary notwithstanding, cases after Costello criticized the practice and talk about the obligations and the desirability of the United States Attorney to present factual witnesses to the grand jury, especially when those witnesses are within the confines of the district. There are cases where they say that such and such a witness was not presented, but that is because he was in Butte, Montana or something like that.

Now, Mrs. Ramos was in Buffalo. Mrs. Jurek was in Buffalo. Mrs. Debose was in Buffalo and there are other factual witnesses that were here. They weren't presented and they weren't presented

precisely and simply because the United States Attorney did not want any of its witnesses to have a prior sworn statement that would be required to be turned over to the defense. That is why they were not presented, and then we moved, we moved for an inspection of the grand jury minutes because it was obvious that there was no factual witness because the indictment said that Burse was at a certain place with others and it was obvious that none of those others had testified, so how could it be possibly anything but hearsay and we moved and we said we believed on information and believed that there was hearsay testimony presented. We asked the Magistrate to inspect it in camera to determine if the Estepa Rule had been violated, for example; if they had been wrongly misled, the grand jury, that testimony that was hearsay was not hearsay, and we also moved for Brady materials. The third time we moved for Brady materials and we said in our moving papers, for the Brady materials, that

Debose had told the FBI that Burse hadn't robbed the bank. We said that in our papers. What do we get back but the affidavit, the Government response received by us on January 11th, dated January 8th. Now, this is a most peculiar document. First of all, it doesn't even admit that there was hearsay evidence presented to the grand jury. It talks about, quote, "Countless other proof possibilities exist which do not involve hearsay testimony", dash, "not the least of which is eyewitness testimony", and then he talks about the sanctity of secrecy of grand jury proceedings when we had moved for an in camera inspection, completely irrelevant, and then we are told that we are going to get any Brady material that exists.

After that, your Honor, we moved for a hearing to determine if there had been improper photographic identification procedures in this case because it was clear to even the most uninitiated person that this case was going to turn on

identification. It was obvious from the very start that it was going to turn on identification and we said on information and belief there perhaps had been people that have been shown photographs. Now, there is no question that a defendant, if such a photographic procedure has been used by the law enforcement officials, the defendant is entitled to a hearing to examine into that. Nobody would deny that in good faith that has read any of the cases on the subject. What do we get in response here, but the Government's response to motion for hearing.

THE COURT: This is January?

MR. STEPHENS: This is dated January 29th and with respect to these motions, Judge, I would like to point out the defendant in this case didn't file a blunderbuss of motions, a great big stack of 156 paragraphs separately numbered asking for the names of the grand jury witnesses. Every single thing that was asked for by the defense in this case in its motions, the defense was clearly entitled to, was

clearly entitled to inquire into and were most relevant to the things that developed during the trial. The question of hearsay testimony --

THE COURT: Mr. Stephens, on the photos that you are talking about --

MR. STEPHENS: All right. On the photographic we asked for that.

THE COURT: Photographic identification.

MR. STEPHENS: We get the Government's response dated the 29th of January. They quote my moving papers as saying, "I believe the principal testimony against the defendant in this case will consist of persons who have identified the defendant as being somehow involved in the bank robbery based upon identification of the defendant's photograph displayed to them by law enforcement officers". That they quote and then the Government says, "On their face that which is offered in support of the request for hearing are patently insufficient in that they are pure speculation and mere conjecture and further, that the request amounts to

nothing more than a fishing expedition."

THE COURT: To get to the point you are now talking about photos that were shown --

MR. STEPHENS: To the witnesses that were going to testify in the case.

THE COURT: But the fact that they were shown to witnesses was not revealed to you, is that the point?

MR. STEPHENS: Right.

THE COURT: Will you tell us, please, tell us the witnesses so it is in the record.

MR. STEPHENS: The witnesses were Barbara --

THE COURT: Mr. Stephens, we are laboring under this difficulty, the facts are crystal clear in your mind because you have studied and restudied the record.

MR. STEPHENS: Yes.

THE COURT: When we were here on the day of the hearing and I have fuzzy recollections of this, but in the meantime, I have heard a number of other trials and as I recall, but I want to get this straight, that certain photos were shown to Mrs. Debose, right?

MR. STEPHENS: Right. That turned out at the trial.

We came in to argue this motion before the Court.

THE COURT: Right.

MR. STEPHENS: And Mr. Skretny got up and he said, "Your Honor, the defendant is not entitled, this is speculation and a fishing expedition", and your Honor said, "Now, wait a minute. Were there any witnesses in this case, Mr. Skretny, that were shown photographs", and Mr. Skretny said, "Yes, there is one", and you said, "Who is it", and he said, "Barbara Ramos", and you said, - this is paraphrasing, I am sure, "Are you going to call Barbara Ramos as a witness in this case? Yes, we expect to, your Honor. All right, we will set the hearing down", and then you set a date and Barbara Ramos, we did have the hearing as to Barbara Ramos, but then during the trial, Mrs. Debose testified and it turned out in the cross examination of Mrs. Debose that she testified that she had been shown photographs, a group of three photographs, one of the defendant Burse, one of her stepson Darrell Debose

and one which perhaps may have been Gary Green. The record is not clear on that, and she testified that she identified the picture of her son, but she couldn't identify the other, so she had obviously been shown photographs and that was something which we were entitled to know, that there had been a photographic display, and then because of the fact had come out late, and during the trial in the absence of the jury, we took the testimony of Special Agent Davidson, I believe his name is, and we inquired of him as to whether or not Mr. Skretny had asked him after the date when our motion papers were filed had Mr. Skretny asked Mr. Davidson "Did you show anybody any pictures", and he said no inquiry was made. Now, that really wouldn't have been helpful, even if the inquiry had been made because Davidson testified he didn't remember showing any pictures, but we say the obligation on the United States Attorney is to inquire of its witnesses and we asked Mrs. Debose,

"Did anybody ever ask you about this", and she said, "No," so it is obvious when our motion was filed Mr. Skretny, either through oversight or just not thinking of it, never asked Mrs. Debose and never conducted an inquiry as to whether or not photographic showups had been made. Now, after that, your Honor --

THE COURT: As far as her testimony is concerned, Mr. Stephens, she testified, by my relating this it begins to get the facts clearer in my mind and that is why I do it, but as I remember, she testified that on the morning that we are concerned with --

MR. STEPHENS: July 30th.

THE COURT: These two young men came to her house.

MR. STEPHENS: Three, - two, you are right.

THE COURT: Her son Darrell Debose was asleep, so they came and she woke him up and they talked briefly. I believe she said she knew Gary Green before.

MR. STEPHENS: Yes.

THE COURT: That he had been there a few times.

MR. STEPHENS: Yes.

THE COURT: But she had never seen the other young man.

MR. STEPHENS: Right.

THE COURT: And didn't know who he was.

MR. STEPHENS: Yes. "Marie", I think she said.

THE COURT: Marie, and then later on she found out this young man's name from her son Darrell.

MR. STEPHENS: Yes.

THE COURT: That is how she got the Marie or whatever, right?

MR. STEPHENS: Yes.

THE COURT: She found that out from Darrell and then after direct examination is finished, then on cross examination, and when was it that it was revealed that she had seen the pictures? Was that on direct or cross?

MR. STEPHENS: It was on cross when I asked her if she had ever seen any, - she had testified that she had seen the picture of her son Darrell and then for some reason I asked "Have you seen any other pictures", and she said, "Yes, the man showed me some

pictures", and she said the man was dressed in civilian clothes and then I said, "Well, whose pictures were they", and she said, "I couldn't say who they were, but he showed them to me and he said these are the other two, Gary Green and Maurice", and so all of a sudden then we have what becomes very important. It could be that the reason why she is saying Maurice Burse was at the house is because the FBI agent told her that the person with Gary Green was Maurice Burse when he showed her the picture.

THE COURT: She had to get the name of Maurice Burse from somebody. She did not know it.

MR. STEPHENS: No.

THE COURT: So that as far as her testimony in court, it was either influenced by her son or by the agent who said, "That these are the other two and these are the pictures".

MR. STEPHENS: Right. At the end of the direct, the source of the name Maurice Burse was her son, and at the end of the cross

it was, - the possibility exists that it was not her son, but the special agent of the FBI.

THE COURT: All right. Are there any other photographs?

MR. STEPHENS: There was no one else that testified during the case that testified they had seen a photograph of Burse, I don't believe, offhand.

MR. SKRETNY: There was, your Honor. That was Barbara Ramos.

MR. STEPHENS: Well, Ramos, we had the hearing.

THE COURT: We had the hearing on Ramos.

MR. STEPHENS: Now, your Honor, the next thing is, and I don't claim that there is prejudice that exists in the case now because of it, but it is further evidence of the pattern of conduct by the United States Attorney's office. We moved and asked for other statutes that the Government would rely on and we were not told of the other statutes. We were given an answer that, "You will be advised if there are other statutes that we rely on that are not named in the indictment at an

appropriate time".

THE COURT: On that score --

MR. STEPHENS: On that score your ruling took that problem out of the case, I say.

THE COURT: At large penalty to the Government, I think.

MR. STEPHENS: Well, if you want to say that the verdicts on two and three were because --

THE COURT: I don't really, but the Government will say, "Judge--"

MR. STEPHENS: "We have already paid the price for that".

THE COURT: "We believe that the reason why the jury brought in the verdict of not guilty--"

MR. STEPHENS: "On two and three was because of the failure to charge on the aiding and abetting".

THE COURT: So that in the Government's viewpoint, at least, whether they are right or wrong, in the Government's viewpoint they paid a severe penalty for cutesy tricksies.

MR.STEPHENS: But what I am trying to do is outline the cutesy tricksies which existed in this case from preindictment through postsummation. I agree that we do not

claim prejudice because of our not being told about Section 2, but we say in all candor that if you want to follow that paragraph in Berger vs. United States the required answer to the question that we posed on that motion is, "Yes, we will rely on both Section 371 and Section 2", end of story.

Finally, your Honor, we come to the summation of the Government and the, - I don't intend to go through everything, Judge. It is outlined in my brief. There are --

THE COURT: Do you have the summation in front of you?

MR. STEPHENS: Yes, I do. The first thing I would like to talk about, though, is not something mentioned either in the moving papers or the brief and it is not something to which an objection was taken during the summation and I will be very brief about this, Judge, but you recall during the trial we were prevented by the Federal Rules of Evidence and by the cases long standing in this circuit and

by the, - I guess Professor Wigmore talks about it in revealing the federal cases, we were prevented from introducing evidence concerning the defendant, - the witness Debose's past conduct, his misdemeanor record and crimes which he has committed in the past with others that he would freely admit and had freely admitted to me in an interview in the jail on December 4, 1974. There is marked as Court Exhibits the records of the City Court including a mugging that he was involved in on Main Street where he and other persons hit a man over the head and took $47 and another incident where he and defendants, not the defendant Burse, knocked a man over and stole $2 worth of food stamps from him on the lower east side here. Now, I have no quarrel, Judge. You ruled that we weren't allowed to get into that and the cases and the Federal Rules of Evidence are completely clear that that is the way it is to be done, and I think it is a hair-splitting process, but having split the

hair and having said that we are not allowed to get into that because that is not probative with respect to truthfullness on the part of the witness, and that's the reason for the rule as I understand it. I mean I don't understand it very well, but then we are met with the argument on summation by the prosecutor that Mr. Debose is telling the truth because of, quote, "Some spark of decency".

THE COURT: Where is this?

MR. STEPHENS: That is at Page 19. Now, no objection was taken. You don't know you have been euchred until you read this thing. They ought to convict Burse because Debose has a spark of decency. I suggest to you, Judge, that if the jury had known that Debose is knocking poor people over and stealing $2 worth of food stamps from them, that there wouldn't be any question in their mind that there was no spark of decency in Debose and that if there was any flame of truth ever in him, it had long since burned out, but that, it seems to me, is additional evidence of

the fact that the rule that prevents us from getting into it doesn't prevent him from commenting.

I agree that the Government can argue that this witness is telling the truth, but they can't argue that he is a decent fellow because we weren't allowed to get into the question of how indecent he is. Now, that is one thing that is not mentioned and no objection was taken. We say it is plain error. We have to take the plain error route because we didn't object to it, but it is something that passed quickly in the summation and there were other objections taken.

The one on Page 7, Judge, becomes important because if you recall, one of our claims to the jury was that Debose was not telling the truth because of the favorable deal he had made with the Government, including the fact that even though he admitted on the witness stand that he was guilty, not only of the conspiracy, but in truth and in fact he had done all of the things that were

alleged in both counts two and three and was guilty of those things also, we pointed out that he was not in jail, he had not been incarcerated and in questioning the witness, it was brought out that on December 4, 1974 he was in the Erie County Jail. Now, we could not bring out the fact that he was in the Erie County Jail because of state misdemeanor charges because the rule says that that is not something that we could get into so we just left it there, that we spoke to him in the Erie County Jail. That was the fact.

Now, on summation the United States Attorney comes along and says, "Now, wait a minute, Stephens is makink a big deal about Debose not being in jail, but you will recall that he talked to him in jail", trying to have the jury infer, and indeed, the Court took up the inference that he was in jail on December 4th on federal charges when the facts of the matter are completely to the contrary and should have been known by

the United States Attorney. Debose was arraigned. He made a thousand dollars bail. He made bail and never was in jail after April 14, 1974 on federal charges. He was in the Erie County Jail on state charges.

Now, we couldn't get up during the summation and say, "Wait a minute, that is not so, he was in on state charges", because we previously had been told that we couldn't bring out the fact that he had misdemeanor problems and had served time in jail for misdemeanor convictions and had many arrests.

THE COURT: Mr. Stephens, let us start from the beginning. We had the robbery, the robbery of the bank.

MR. STEPHENS: Right.

THE COURT: Mr. Debose was arrested and he went to jail and he could not make bail.

MR. STEPHENS: I think he may have went to jail for one evening or two evenings, but the records and the docket entries indicate that on April 14, 1974 a thousand dollar bond was required. He made it and on

arraignment Stuyvesant Insurance posted the bond, so after April 14th he was not incarcerated on federal charges.

THE COURT: Not on federal charge, right?

MR. STEPHENS: Right.

THE COURT: Then you say that the reason he went to the Erie County Jail was that he was arrested on state charges.

MR. STEPHENS: Yes. Oh, he had --

THE COURT: He went in there sometime, naturally, after April.

MR. STEPHENS: After August.

THE COURT: In August?

MR. STEPHENS: Yes. He was arrested, - the bank robbery was in July. He was arrested, - he was arraigned in August, the middle of August and he made bail in the middle of August.

THE COURT: You are talking about April. You mean August?

MR. STEPHENS: I mean August. If I said "April" I misspoke.

THE COURT: Then the state charge came along shortly after?

MR. STEPHENS: Well, I think it was a cumulation

of charges.

THE COURT: After he made federal bail, then he went in on the state charge?

MR. STEPHENS: And he was in jail waiting disposition of a number of state charges.

THE COURT: Then you interviewed him in jail?

MR. STEPHENS: Right.

THE COURT: In December?

MR. STEPHENS: December 4, 1974.

THE COURT: Of course, when you cross examined him, in order to call to his attention time and place of the interview, you say, "Didn't I talk to you in jail, Mr. Debose, on such and such a date".

MR. STEPHENS: Right.

THE COURT: And he said, "Yes".

MR. STEPHENS: Yes.

THE COURT: The federal prosecution in summation, - where are we?

MR. STEPHENS: Page 7. "Now, Mr. Stephens -- "

THE COURT: "Now, Mr. Stephens pointed out to you, but he also did point out to you that in fact when he conducted the interview in December of '74, he was in Erie County Jail and we ask you to take that

into consideration also."

R. STEPHENS: And I say, "I object to that because that inference that he seems to draw is not", and I think I said, "True", and I continue, "and I will show and ask the Court to tell why he was in the Erie County Jail". Now, you see, I didn't want to say the reason he was in the jail at that time was because he had all the state charges against him because somebody would have properly reprimanded me, I think, and then never got back at the end of the summation because of all the other objections.

THE COURT: Let us go back to his argument. He says that he was in Erie County Jail and, "We ask you to take that into consideration also". Mr. Debose is the Government's witness.

MR. STEPHENS: Right. The witness who I attacked as being not worthy of belief because of the deal he made including the fact that he is not on the street and the words, "We ask you to take that into consideration also", is what I claim an appeal

to the jury to draw the inference that when he was in jail in December of '74 he was in jail on the federal charges and then your Honor, in your explanation, apparently took that inference and you say, "Apparently", or "Evidently at that time suitable bail arrangements had not been met", but that wasn't the case at all. Suitable bail arrangements had been met. Suitable bail arrangements had not been met on his state charges.

THE COURT: Let me see what it says before that. Here then the Court really added to the difficulty because this is something you could not talk about.

MR. STEPHENS: Well, I didn't think that I should. I don't expect that you would know the status of every defendant in this courtroom, but I would expect the United States Attorney to know, at least the one that is on trial.

THE COURT: Certainly the inference when you consider the arguments that you made in your summation, the inference clearly is you were charging that there was a deal

here.

MR. STEPHENS: Yes.

THE COURT: And the inference that is left is, "Really, we didn't deal with Debose, we didn't give him a break at all".

MR. STEPHENS: Because he is in jail in December.

THE COURT: "Because he is in jail". All right.

MR. STEPHENS: Now, there is just a couple of others that I will mention that are also mentioned in the brief, including the last one, Judge. First, the business about there are other, - bank robberies are becoming more frequent.

THE COURT: Where is this, Mr. Stephens?

MR. STEPHENS: Page 17, your Honor. "The Government must take its witnesses as it finds them. It has no choice in the matter. Unfortunately, there are people who rob banks and it appears to be more and more people all the time. Object to that, object to that now. Excuse me, Mr. Knisley, my attention was diverted. I am sorry."

The reporter reads back, "Unfortunately, there are people who rob banks and it appears to be more and more people all

the time", and then you sustain the objection and advise the jury that they are only to consider, although you did say, Judge, my obligation to my client compels me to point out, you say, "If what Mr. Skretny says is so", which when I read that, I get the impression that the Court is agreeing that there are, and I think there probably are but --

THE COURT: Well, I think that --

MR. STEPHENS: It probably is a fact that there are more.

THE COURT: I think that the jury, - the reason I said that was it seems to me that the jury in reading the papers and so forth had come to that conclusion before they sat here as jurors.

MR. STEPHENS: Well, that is probably so.

THE COURT: And I wanted to emphasize the fact that it absolutely made no difference whatever in this case.

MR. STEPHENS: Right. but certainly the defendant Burse shouldn't be convicted in an effort by the jury to cut down on the number of bank robberies.

E COURT: And the Court should not be put to the burden of explaining because the United States Attorney --

R. STEPHENS: Shouldn't have said it.

HE COURT: Should not say things like that.

R. STFPHENS: That's right. Now we get, Judge, to the last. First of all, the could have been remark, I think it is at Page 36. This is the, - I think that there are a number of times, Judge, when you interrupted and with respect to the Government claiming that Mrs. Stevens said she was under the influence of alcohol all the time. That wasn't the testimony and it was not, - certainly an attorney should understand the distinction between having a drink every day.

THE COURT: Especially an attorney, Mr. Stephens.

MR.STEPHENS: And being under the influence of alcohol, but then we get to, - my recollection of the record is that Mr. Debose marked the exhibit, Government Exhibit 3, I believe it is, or 3A with the initial and the circle around it of where Burse was standing when he, Debose, was at the

window robbing the bank. Now, at the very beginning of this case a long time ago when we came before you on the Ramos motion, and this transcript is printed, the Government, if it wasn't aware before that time, became aware that we were going to rely quite heavily on the fact that there was no picture of Burse in all the pictures of the surveillance cameras.

Now, as I recall Debose's testimony, he said that he was standing there and then he got the money and he ran and he met Burse and they went out the door together. Now, if the Government wanted to show that Burse had moved himself from where it was marked on the exhibit, we say it was incumbent on the Government to ask Debose the question, even to the point, even if Debose didn't know, to say, "Do you know whether he moved or whether he remained in that position while you were at the window and after the teller started handing you money", but no questions like that were ever brought

forth by the Government and so we argued to the jury that Burse was right in front of the camera and if Debose was telling the truth, his picture would be there.

Now, when the picture is there, it means something for the Government. It seems to me that when it is not there, it should mean something, and then we are met with the argument on summation by the Government after we have argued, we have no opportunity to respond, "Look at the area where the defendant Maurice Burse could have been in that lobby. Object to 'could have been'". The only witness who says he was there has marked it with an initial where he was, and then we say, the Court tells the jury that it is speculation where he could have been. "Could have been", Judge, wouldn't be allowed in the Small Claims Part of the City Court of Buffalo in a fender case.

THE COURT: The other thing, Mr. Stephens, and it occurred to me during the trial, as

I recalled at the hearing there was testimony of the bank officer who said that he noted as Mr. Burse was leaving, that as he recalled, he saw another individual standing near the doorway. His exact position I cannot recall at this time.

MR. STEPHENS: Right, and that --

THE COURT: But he was standing near the doorway and then he ran out of the bank and he chased them for a little while.

MR. STEPHENS: Right. That is true, and the 302 of that witness says that there was another person near the doorway who met the one that was at the window so that if testimony had been presented that he had moved, we could have presented the bank officer's testimony that he was standing there, that he was near the doorway where the camera was, but we --

THE COURT: The Government had this witness and chose not to use him and it seems, - I have not thought this through, but if they have the witness who was in the bank and is a responsible person and they

do not use them, then it seems to me that it makes it pretty hard to say, "Ladies and gentlemen, we don't have evidence here, but you know he could have been here or he could have been there because this witness, maybe he couldn't have given you the exact spot where he was, but he would have been able better than any one of us to say where this man was".

MR. STEPHENS: But to argue the could-have-beens, Judge, it could have been somebody else. The could-have-beens are endless, but then your Honor says to the jury that it is speculation. "It would seem to me it is speculation", but then he continues and says that Burse had moved before Mrs. Jurek handed the bait money.

Now, it is very simple for him to ask Debose whether or not Burse had moved from the spot he marked on the exhibit or where he was standing when he met him as he came out the door, but he never presented any evidence on that. Now, it seems to me he has to make the inquiry

before he can argue that he has moved. It is not incumbent on us to have him standing there like a stone when the witness says he was there right in front of the camera.

Now, Mr. Skretny says that we are trying to make an automaton out of him. He can argue inferences from facts but if there aren't any facts that Burse moved, if nobody has made an inquiry and if there isn't any testimony that he left there before, then he can't argue that. He can't say, - see, the problem is he can't explain the picture. The physical evidence is so compelling that Burse was not standing there and he can't explain that so he has to --

THE COURT: Mr. Stephens, there is from just looking at the diagram, I think, there were obvious places where Mr. Burse could have stood, or anybody, anybody could have stood and not be in the camera range and yet be within the eyeview of a person in the bank.

MR. STEPHENS: But that is not where Debose is

placing him and he could have argued that. He could have said --

THE COURT: I think where Debose placed him is also a question for the jury because as I remember, it is not that clear where Debose placed him and whether or not he would have been picked up by the camera shot where Debose marked.

MR. STEPHENS: But it is one thing to argue that he would not have been picked up by the camera shot and quite another to argue that he left the bank or that he had moved himself from the position before the surveillance camera started to operate, because with the one --

THE COURT: There is no evidence of those two things.

MR. STEPHENS: Right, and then we have, Judge, the comment of the United States Attorney, "That the defendant has not told you the truths", which I believe is at --

THE COURT: I thought there was only one truth.

MR. STEPHENS: Page 25.

THE COURT: Maybe in this case there are a number of truths.

MR. STEPHENS: "What I am saying to you is that the defendant didn't tell you about all the truths", is the way it reads in the transcript, and then objection was taken and I say that that, talking about what the defendant did or did not tell you is an inference or an appeal to the jury to take into consideration the fact that the defendant did not take the witness stand.

Now, in the page before that, a most remarkable statement by the prosecutor, and I suppose he will try to use that as an explanation for what occurs on 25, but he says, "Do you know the defendant pointed out various things and by the defendant I mean Mr. Stephens", and there is a story, Judge, that was just in one of the Second Circuit cases and I point out that it was in one of the Second Circuit cases because Mr. Skretny is always accusing me of telling stories that don't have anything to do with the law, but the story is, as written by one of the judges of the Second Circuit, that

Lincoln asked his cabinet, "If you count the tail of a sheep as a leg, how many legs does the sheep have", and the cabinet said, "Five", and Lincoln said, "No, four, because a tail is not a leg". "Now the defendant, I mean Mr. Stephens", - really, Mr. Skretny knows better and I certainly hope the Court makes the distinction if this case ever comes on for sentencing. There is a distinction between the defendant and Mr. Stephens.

THE COURT: Of course, there was also Mrs. Stevens in this case, too.

MR. STEPHENS: Yes, with a "V" and not a "ph", as those of us from the north of Scotland like to spell it, but really, the United States Attorney, - I don't mean to tell him how to sum up in a case, but he shouldn't refer to the defense attorney as the defendant.

THE COURT: As Mr. Knisley knows, I get defendants and lawyers and defense lawyers and Government lawyers mixed up all the time. The other day we had a defendant in here and I was calling him by the name of his

attorney and he was a little confused.

MR. STEPHENS: Well, we will try then, Judge, to always ascribe to every misstatement a charitable purpose rather than one that is sinister in nature, but the whole point of all of this --

THE COURT: I am looking at this. Now, we go on to Page 4, and skipping over Stephens, and then he says, "Again I submit to you those are a smokescreen because what he didn't tell you about and what is important here is the truth and what, in fact, did Darrell Debose say. We know that there was a meeting at the house and that was corroborated. That was the truth. We know that they went to Lackawanna and by 'they' I mean Debose, Burse and Green and we know that they went to Evon Wright's. We know that was the truth and we know that they left Evon Wright's and the bank was robbed and we know that was the truth and Darrell Debose told you all that." Is that the District Attorney testifying here; is that proper?

MR. STEPHENS: Well, to the extent, I suppose, that

it could be considered as an expression of his belief.

THE COURT: Does it make any difference if he says, "I know it is the truth", or "We know it is the truth"?

MR. STEPHENS: Well, what he should say is, "I think you can find that is the truth". I misspoke during my summation where I said, if you will recall I showed him the picture of Gary Green.

THE COURT: Then here he did say at the end of that, "What I am saying to you is that the defendant didn't tell you about all the truths", which clearly is a comment upon his failure to testify.

MR. STEPHENS: That's why we objected, Judge. The defendant didn't tell anybody about anything and has no responsibility so to do and whether, - why he said that I don't know, and there also is toward the end, Judge, the business about if we have the defendant on the facts then he argues the law, do you recall that passage. "It all pretty much boils down to this --"

THE COURT: What page is this?

MR. STEPHENS: Page 41, "If the Government has the facts in the case by virtue of the proof a defendant will argue that the Government's case is deficient on the law. If the Government has the law on its side, the defendant will argue the Government's case is deficient on the facts. If the Government has both the facts and the law going for it, the defendant is going to say that all of the Government witnesses are lying and that is what we have here". Now, it seems to me that Mr. Skretny is drawing on his fast experience in telling the jury here, "Look, you and I know that these people are always guilty. What happens is they come in and either they argue the facts or they argue the law or they claim the witnesses to be lying, but pshaw, we know all defendants do that".

Now, Maurice Burse shouldn't be saddled with what all defendants do or a defendant does or a class of people do, and we objected, "Judge, I object to this. I don't see where it advances the search

for truth or helps to claim that the defendant would do this and that if the circumstances were different. It just seems to me to label this defendant on the basis of Mr. Skretny's experience with other defendants. It brings in a whole panoply of objectional ideas", - I didn't even know I knew the word "panoply", Judge, "for the jury to consider". I think that was an objectional argument and it shouldn't have been made. It certainly would have been better left unsaid, but, Judge, the transcript of the argument speaks for itself.

What we say to you, going back to Berger vs. United States, that this whole thing, every aspect of it, the hearsay indictment, the failure to turn over the statement that Jimmy Barner robbed the bank, we claim no prejudice from that. We got it finally. We got it through our own diligence by coming in and watching the trial of Gary Green but why didn't we get it. It was his obligation to do it. He must do as they say in Berger vs.

United States. It is like somebody is playing poker and they don't want anybody to see their hand. The defendant is entitled to have those things. The Supreme Court has said under Brady vs. Maryland we are entitled to those things so that's why we ask, not only that we have a new trial on the conspiracy, but let the Government go back to square one and present a witness to the grand jury that knows something about the facts, not just an FBI agent who mouths interviews and things like that, but someone who will have a sworn statement then. Let's have Anna Debose's sworn statement and Barbara Ramos' sworn statement and enough sworn statements to have a non-hearsay indictment and then we will go through and try this case on the conspiracy count only because we claim we have been under jeopardy under the Sixth Amendment on counts two and three.

For all those reasons we ask for a new trial on conspiracy under R[illegible] we ask that in the exercise of y[illegible]

power as the supervisor here in this courtroom of what goes on and what the United States Attorney's office does that you dismiss the indictment without prejudice. They can bring the indictment again. The statute hasn't run and let us have a trial, a proceeding that conforms with what the courts have said.

THE COURT: Only on conspiracy.

MR. STEPHENS: Only on conspiracy. We want to have our cake and eat it too, and I am not ashamed to say that Mr. Skretny says, "You can't do that". You can search all the law books and you won't find a double jeopardy case which says it is not double jeopardy where the jury returned a verdict of not guilty, I don't think.

THE COURT: I don't say I disagree. Mr. Skretny.

MR. SKRETNY: I don't say I disagree either, your Honor, and I will attempt to be brief in my remarks and I am certainly open for any questions from your Honor with respect to any of the points raised by Mr. Stephens.

929

I would like to preface my, quote, rebuttal to Mr. Stephens by saying to you that I firmly believe that we lived up to our responsibilities to fairly prosecute the case and I think that a close analysis of the remarks directed to your Honor by Mr. Stephens will be reflective of the fact that there were tricks utilized, that there was no pre-designed prejudice to this defendant at the trial held here before your Honor last month.

If I may, I would like to just briefly go through the point areas as I have copied them down during the course of Mr. Stephens' remarks to your Honor. First, with respect to the hearsay aspect of the grand jury proceedings, I call to your Honor's attention that your Honor has already once decided the motion to dismiss the indictment on the grounds of hearsay. We submitted grand jury transcript for your Honor's perusal. You examined that, as I recall, in camera, and denied the motion of defense counsel.

I think that is a very extremely fair

I believe you cited Costello and a line of other cases which you just generally mentioned.

THE COURT: Mr.Skretny, that no doubt is true and I think that as I explained, perhaps then it seemed to me within the letter of the rule the Government was right. However, within the spirit of the number of suggestions made by the Second Circuit and by this Court, that in the important cases where you are going to have witnesses,- not in a case where you have a confession,- I am not talking about a case like that,- but in important cases where there evidently is going to be a hot dispute about the facts, it is to the benefit of the Government to call the witnesses in who know the facts, to carefully interview these witnesses so that they will in a very careful way present the facts accurately and completely at the time of the grand jury presentation. It seems to me that if that occurred in this case, it would have been to the Government's benefit as well as everyone else's because

this confusion, for example, about whether or not Mrs. Debose saw a photograph would have been known to the Government at a very early stage in their preparation and then you would have been able to answer Mr. Stephens' question accurately about whether or not Mrs. Debose saw a picture or whether she didn't see a picture. I know you argue that she never saw the pictures, but on the other hand, we do have her testimony and she said she did see them.

The other thing is, sticking to the grand jury presentation, I believe that it is the obligation of the Government to try not only to live within the letter of the law, but also the spirit of it, and I think that the Appellate Court is giving you, giving out signals here which you better heed to, and the signals are that we think that you ought to put witnesses to the grand jury that have first-hand knowledge of the facts. We are giving you a space of time here to put your house in order, but if you don't

do it, an important case is going to come along where we think that defendant has been prejudiced by the way you have proceeded. We are going to dismiss it.

MR. SKRETNY: I would tend to agree with your Honor. We do live up to that responsibility. I have to, you know, in justice to my client, indicate to you that this is a case where just to get hold of witnesses was a significant accomplishment for trial purposes, let alone attempting to duplicate that for grand jury purposes, but we didn't indicate previously, and as your Honor I am sure is aware from the study of the transcripts made available, we did have a bank official testify. We did have an on-the-scene witness testify. True, she did not testify at trial, but the fact is she was present before the grand jury and there was no, absolutely no attempt by our office to misrepresent any of the aspects of the case presented that was hearsay to the grand jury. We took specific precautions to guard against that in light of the

933

Estepa case.

Moving on to Point 2, in the order that Mr. Stephens raised the point, was the Brady matter. I acknowledged to the Court it was not until near trial time that I was made aware of the statement of Mr. Debose concerning his statement to the FBI that James Barnam had in fact committed the bank robbery when asked by the FBI. You know, that was my mistake. I was not complete enough in my review of the trial, but Brady is all contingent upon prejudice and what we have here is really not a Brady situation based on the case law, and it is all cited in my brief that where the defendant has notice that in fact, - of some information that he can utilize in calling a witness to the stand or exploring that witness' testimony on cross examination, there is not a Brady requirement or obligation on the Government to turn that information over, so we don't even have Brady here.

THE COURT: Let us go back, Mr. Skretny. Mr. Stephens says now that he doesn't argue

that the failure of the Government to comply with Brady eventually prejudiced his client because of his own digging. He simply says that it is part of the history of the manner in which the Government went ahead in this case because whether this was your fault or not, Mr. Skretny, it is some things where he called to your attention at a very early stage that in his belief that Mr. Debose had named another man as the perpetrator and not Maurice Burse. It could have been easily found out a long time before. The problem can have a number of very important repercussions. It certainly at an early stage, - everybody ought to know the facts as well as they can so that if there was a man by the name of Barner, Mr. Stephens, if he knew about it at an early stage, could have interviewed Barner. There are a number of things that could have been done. Maybe if you had dug into it and talked to the agent and he said to you, "Well, I don't think there is a Barner",

then you could take one course, but or the other hand, if he said, "I think there may be a fellow by the name of Barner", you would say, "Well, let's find him, let's interview him", so that this is now argued by Mr. Stephens, as I understand it, as part of the picture which has infected this case from the beginning or perhaps the letter, and I do not think here you observed even the letter of the rule, but attempt to hew the line and answer the direct question by evasion and by answers which really do not give any information. I think that is how it stands. He doesn't argue prejudice but I do say that it is pretty clear that Brady required an early inquiry, certainly, especially because of the signal given to you by Mr. Stephens.

MR. SKRETNY: I can represent in good conscience that I did review that file pursuant to our obligations under Brady and that particular statement containing that reference to Mr. Barnam escaped me. I was not intentionally withholding that.

It was just a simple oversight in carrying out my responsibilities under the Brady decision and I will just conclude by stating that with respect to your --

THE COURT: Mr. Skretny, I cannot let that go. I sat here and when I began to listen to you, I said, "I will not interrupt", but this is a relatively simple case. There were not that many statements. You have the obligation to sit down with the agent and I cannot see how you can tell me that this missed your attention through oversight. It stuck out like a sore thumb. All right. Well, continue.

MR. SKRETNY: In any event, the defendant in this case had that information at least seven weeks prior to trial.

As far as the eyewitness, Mrs. Anna Debose's testimony goes, with respect to the events of July 30, 1974, counsel urges upon the Court it is our obligation, - that is, the prosecutor's obligation to bring the witness in and specifically inquire of that witness whether or not photographs were presented to him or her

under the respective situation that exists. I submit to this Court that that is not our responsibility. Our responsibility is to review the file in light of the request of the defendant, which we did. Were photographs shown to Mrs. Anna Debose. No reference made in that file with respect to any showing of photographs. Mr. Davidson, when he testified, indicated specifically that, one, he did not recall there ever being any photographs shown to Mrs. Debose and, secondly, if photographs were shown to Mrs. Debose, that information would have been in the file. I submit to your Honor that in reviewing the file in the fashion that we did, that satisfies our responsibilities as far as the good faith effort that is required on the part of a prosecutor to advise the defense. With respect to that, there was certainly no prejudice to the defendant in this case.

Mr. Stephens made inquiry. He elected to call the attention to the jury the fact of Mrs. Debose's testimony at the

hearing out of the jury's presence. He used that information in his summation and I call in particular to your Honor's attention to that portion of Mrs. Debose's testimony that I made known to the jury during my closing argument; the fact that she said, "It was not the photographs of the boys that I remember, but it was the faces of the boys from which I identified the defendant", and I think that is the key here and that was called to the jury's attention and Mr. Stephens commented with respect to what her testimony was and I submit to your Honor that there was no prejudice that could have resulted and that is not indicative of any factor for totality purposes in determining whether or not the Government had some sort of a grandiose scheme from the outset of this case or in the way it handled this case which worked to the disadvantage of the defendant in this case.

THE COURT: I think there are several comments which I ought to make at this stage,

939

Skretny. One is that as far as this particular case is concerned, and in your preparation for it, you knew, for example, that at a very early stage there was a young man by the name of Kenny Burse who was a good friend of one of your principal witnesses. I think it was also obvious at an early stage in talking to the agent that there were a number of brothers, almost all of the same age, there was maybe only a year's difference in age between them; that this in a way, I suppose it is Monday morning and looking at it in hindsight, but there is a good deal of family resemblance between the Burse brothers and I believe that just a few minutes of conversation with the agent who was involved in this case would have revealed that.

Furthermore, there was good reason here why the witness who was a friend of Kenny Burse and who identified Maurice as being the fellow there in her apartment at a particular time had good reason to perhaps want to point out Maurice Burse

as the fellow who did certain things and not her friend, Kenny, because of the relationship between she and the brother.

On your comments on preparation, I think that you are, and I think it is most important and maybe this is the most important one, if you are saying to me that you believe that the duty of the prosecutor is simply to look at the cold record in the file while he is in the process of preparation, I say to you that that is, first of all, it is a very silly and foolish way to proceed because even the best investigators cannot know what other information is coming in to your file so that there are certain facts which they are aware of, certain background information they have which they wouldn't put in their report because they would just think, "Well, it is not important", but if you sat down with the agent who was preparing the case within a short period of time, it can become evident that there are a lot of other facts that ought to be looked into and certainly with

a person like Mrs. Debose it seems to me it is crystal clear that the only, - after a short interview with her, - that the only way that she could have made a judgment that it was Maurice Burse in her house rather than one of his brothers or some other young man, is because her son told her so. We do not know why Darrell would say Maurice rather than Kenny or rather than some other person not of the Burse family, or she got the information from the FBI agent who said, "These are the photographs here", so I certainly hope that you do not follow this procedure in other cases and simply look at what is in the folder and say, "Well, witness, we are ready for trial, get on the stand and we will have you testify about what is in the 302", because you are certainly in a practical way going to be burned again and again. Again, this gets back to the wisdom of calling to the grand jury witnesses who have knowledge of the events. In some cases you are going to find that these

people are going to say, "I can't remember", but you know that then at an early stage of the proceeding and you do not wait for the day of trial. You do give the other side an opportunity, another paper that they can use to cross examine from, but if you carefully prepare your witnesses before they testify, there is no real danger in that and, as a matter of fact, where a person testified before a grand jury, a couple of weeks after a trial his recollection is certainly much better than if the trial takes place a couple of years thereafter. Well, go ahead.

MR. SKRETNY: I believe the next area dealt with the summation and I am casting aside the reference to the Section 2 decision by the Court which was alluded to by Mr. Stephens.

With respect to the summation, I think a couple of comments are in order. First, with respect to the Government's argument concerning Darrell Debose. I think again you have to read the argument

in its entirety and consider it as that in evaluating what was said during the course of the closing argument, and I think that is particularly true, for example, in our reference to the spark of decency that may have caused Darrell Debose to cooperate with the Government. That comment was made in light of and in context with a further remark concerning the witness Mrs. Debose and the jury's duty and obligation to consider her interest and her credibility and her honesty and her good character with respect to the substance of what she testified to.

We also posed an alternative to the jury with respect to the spark of decency. In the argument we made reference to the spark of decency or his consideration of, in fact, the fact that he might get a harsher sentence if he did not testify truthfully in the case. We said take both of those particular things into consideration in evaluating the credibility of the witness that is on the stand and

I think that is a very extremely fair statement to make with respect to a jury's evaluating the testimony of a witness.

With respect to the in-jail aspect of Mr. Debose, there certainly wasn't any agreement by the Government and that was, I think, made clear on the record, concerning Mr. Debose's being out free on bail, but that was the inference that the defendant was trying, and by the defendant again I am referring to Mr. Stephens and I will point out to the Court where that same situation arose in the closing argument where Mr. Stephens tried to draw the inference that we were a party to some agreement to have Mr. Debose released because he was going to be a Government's witness in the case. Well, that certainly was not the case and our reference to the fact that he was in jail was in direct comment to the argument used by Mr. Stephens and that argument itself made specific reference to it, at the time that Mr. Stephens interviewed the witness

the witness was in jail. We simply

pointed out to the jury that that information was brought out on the cross examination of that witness by Mr. Stephens and the transcript thoroughly reflects that. "Consider the fact that Mr. Stephens told you that the witness was in jail in determining his credibility", and whether in fact, you know, the Government was in fact a party to any agreement to have this defendant out on the street because we weren't. It certainly is a fair inference to call to the attention of the jury.

With respect again to the number of increasing bank robberies, I think again if you read the entire testimony and the specific portion of the closing argument that that relates to that particular comment, it is obvious that that comment refers to the witness Darrell Debose and not the defendant Maurice Burse. That's the way it was used.

I think with reference to the location of Mr. Burse, well, it was clear from the exhibit 1 that the cameras were

not set up precisely accurate so that it was a valid inference for the Government to point out to the jury that they could consider that fact that the cameras didn't necessarily have to have in camera range the area which the chart indicated that might be the case, so I think from that standpoint and from the law that exists currently, we can argue legitimate inferences and we submit that simply was a legitimate inference and that inference was drawn from proof elicited at trial, not from an absence of proof, especially with respect to when the cameras are activated. There was testimony at trial that the camera is activated at the time that the bait money is pulled out. We simply stated what we know later took place, that the defendant at some point left that lobby. The jury can determine from that proof when in fact Maurice Burse left that lobby. That is certainly a fair inference under the testimony that was elicited at trial. The jury had the benefit of the

chart, the exhibits.

Judge, I don't recall, - oh, with respect to the comments, and I think I will wrap up with these remarks, as set forth in our brief, there are numerous page references to where the Government used the plain language in telling the jury, when the Government says, "The defendant would have you believe," what it was saying was that by the defendant, the Government means the closing argument of Mr. Stephens and that is specifically set forth in the transcript at Pages 23, 24 and 26. There is no way that the jury could draw the inference that, in fact, what the Government was doing was unfairly commenting on the defendant's failure to testify at trial and I submit to you if there was even the remotest possibility of that, that fact was cured by your Honor's instruction and charge to the jury that they were not to take those remarks in light of the defendant's failure to testify at trial in that particular case, and I submit to you it

is not an indication or an indicia of a scheme again by the Government to prejudice the defendant. It is clear from the closing argument in its entire context that what the Government was referring to was the defense closing argument by Mr. Stephens.

We submit to you, your Honor, that in light of those comments that there is nothing sufficient there to warrant a new trial under Rule 33 on the grounds of prejudice resulting to the defendant in this case.

THE COURT: What I will do is I will reserve decision. I will ask you to come back next Friday at 9:00 o'clock and at that time I will announce my decision and give reason for it, at 9:00 o'clock next Friday in court, Mr. Stephens. Any further material either one wants to submit to me?

MR. STEPHENS: No, your Honor.

MR. SKRETNY: No, your Honor.

THE COURT: All right. We will be in recess.

* * * * * *

PROCEEDINGS: November 7, 1975, 9:00 a.m.

APPEARANCES: As before noted.

(Defendant present.)

THE COURT: United States against Maurice Burse, Criminal 1974-227.

We are here this morning for the decision on the motion for a new trial. Mr. Burse is here with counsel, Mr. Stephens, and I have considered the briefs and I have, - of course, I had the recollection of the testimony of the trial and I reread the summation. Is there anything either wants to say before we proceed to decision on the motion pending before the Court?

MR. SKRETNY: The Government has nothing further.

MR. STEPHENS: Nothing on behalf of the defendant, your Honor.

THE COURT: As I understand, Mr. Stephens, you have withdrawn your motion for a mistrial made during the trial.

MR. STEPHENS: Yes, your Honor.

THE COURT: And you have also withdrawn your motion for judgment of acquittal pursuant to Rule 29.

MR. STEPHENS: I don't consider I have withdrawn that. I think, your Honor, what I said was in preparing the brief on the motion, I have to frankly admit that I don't think that an argument that the record would support a judgment of acquittal would - -

THE COURT: All right. I think then we can fairly say, Mr. Stephens, that your main emphasis is on the motion for a new trial pursuant to Rule 33.

MR. STEPHENS: Yes, and/or alternatively a dismissal of the indictment without prejudice on the grounds that were urged in the brief, your Honor.

THE COURT: That is because of lack of proper procedure in presenting this to the grand jury, that, coupled with everything that went after, which was revealed at the time of trial.

MR. STEPHENS: Precisely, Judge.

THE COURT: Because the Government did not put their principal witnesses to the grand jury that not only was the indictment itself defective, but it also prevented the proper cross examination and presentation of

defendant's case.

MR. STEPHENS: Yes, Judge.

THE COURT: The motion for a new trial is based in this case not on the fact that there was new evidence discovered, but simply in the interest of justice, is that right, as I understand it, Mr. Stephens?

MR. STEPHENS: Yes, Judge.

THE COURT: The motion, based upon this consideration, the standards are difficult to find from the cases. Perhaps the definition, as well as I could get it, was set forth in United States against Leach, 427 F2 1107, where the First Circuit had this to say, "Motions for a new trial are directed to the trial Court's discretion. Under broad power, the Court may weigh the evidence and consider the credibility of the witness. The remedy is sparingly used, the Courts usually couching their decision in terms of exceptional cases", and then there were a number of District Court cases cited and many of the cases that I have looked at had to do with the situations where the credibility of the witnesses was at stake.

I think too that one of the factors that we have to take into consideration in some cases the evidence is so clearly against the defendant that, let us say, a prosecutorial misconduct, although beyond the bounds was excused. The closer the case gets, the closer the scrutiny of the District Court must be in determining whether a motion for a new trial ought to be granted in the interest of justice.

In this case, as we all know, Mr. Burse was found guilty of conspiracy and not guilty of the two other counts involved in this case. One involving robbing the bank by intimidation and the other larceny of the bank funds.

I think that we can all agree that the evidence in the case is not overwhelming against Mr. Burse. I think it is a case where the jury could have easily voted up or down on the evidence presented here. The testimony consisted of the testimony of Darrell Debose, a co-defendant and alleged co-conspirator. The testimony of Mr. Debose's mother who related that she

saw her son in the company of Maurice Burse early that morning. The testimony of Evon Wright who lived close to the scene of the bank and who had known Maurice Burse for some time and who related that the three, Gary Green, Maurice Burse and Darrell Debose were together shortly before the robbery and then shortly after.

I think it was clear that she knew that there was illegal conduct on the part of these three defendants. We also have the testimony of Barbara Ramos which again certainly was thin. She saw the two young men running by her porch when she was coming down the stairs. Her description of Darrell Debose who was a very tall young man, I think we could say certainly that she was able to identify him. As to the other man, she identified Maurice Burse and yet there were some parts of her testimony which would indicate that perhaps the man she saw was, in fact, Gary Green, the third defendant and who had been tried previously and convicted as a juvenile delinquent.

Green was about five foot six inches in height and clearly, Maurice Burse is taller than that. He is about five nine or five ten.

The people in the bank, none of them identified Maurice Burse as being in the bank. The only person that put him in the bank was Darrell Debose who said that he was standing near the doorway.

There is another difficulty with the testimony of Mrs. Debose. She knew Gary Green because he had been at her home on a number of occasions. She testified that she had never seen Maurice Burse before that she could recall and that she found the name out either through her son shortly after he was arrested, within a day or two after the robbery and he told her the other young man was a man by the name of Maurice and I think he also told her his last name was Burse, or she found the name out through conversation with an FBI Agent. The agent denied showing any photographs to Mrs. Debose. Mrs. Debose, on cross examination, and I believe this was a surprise to the

prosecutor and to the agent, testified that a few days after the robbery, that the agent who testified here in court came by her home and showed her photographs, showed her the surveillance picture of her son and also showed her photographs of Gary Green and Maurice Burse and said, "These are the other two young men, are they not", or words to that effect.

We had a hearing on this question. It seems to me that clearly there is no reason before the Court not to believe the testimony of the agent who said that he never showed Mrs. Debose any other photographs.

On the other hand, there is a mystery and that is a person such as Mrs. Debose, unfamiliar with police practice, would come into court at this state and tell us that an agent had, indeed, shown her photos of two other young men in addition to her son and identified one of them as Maurice Burse.

I think that in all, as far as that factor is concerned, we just cannot fault the Government on the one hand for not bringing this to the attention earlier, and

on the other hand, it seems to me there is no reason not to believe the testimony of the agent.

The testimony of Evon Wright here is, I believe, crucial. She said that Maurice Burse came back to her home a few minutes after the robbery and then left and that Darrell Debose stayed there for some time during the day and, as a matter of fact, was visited during the day by the FBI and she told them that he was her boyfriend and he had been there through the day.

In this case, the problem of the presentation of the case before the grand jury, the defense asserts is a violation of the defendant's rights under the rules expressed in United States vs. Estepa, 471 F2 1132, and there the Second Circuit condemned the use of hearsay testimony before the grand jury, which the grand jury was led to believe was solid evidence. In this case here it was hearsay testimony brought to the grand jury's attention. The witnesses before the grand jury were a bank officer who told about seeing a man matching the

description of Debose come to the teller's window and he also identified another man in the doorway or said there was another man in the doorway, but he could not identify him and did not identify him as Maurice Burse. He chased them a short distance from the bank, but lost them as they turned a corner.

For some reason, which I cannot understand, he was not called to testify during the trial.

The teller testified and related her conversation with Debose, but as far as I understand it, she did not see any other individual who was connected with Debose.

The witness, the main witness before the grand jury was the FBI Agent who interviewed Darrell Debose a short time after the robbery. He also did a strange thing. He took a statement from Debose which left out the names of the other men who were connected with this incident and he told us, though, that Debose orally related to him that the other men were Maurice Burse and Gary Green.

I find that this kind of procedure perhaps used to keep secret some information an agent has does not really help the cause of prosecuting cases.

Based, I suppose, mainly upon the testimony of the FBI Agent, the grand jury returned an indictment.

In this case, Mr. Stephens charges that Mrs. Debose and Evon Wright and others who were directly related to this incident should have been called to the grand jury. The prosecutor explains that at the time this matter was presented to the grand jury that Darrell Debose was certainly a target of the grand jury's interest and they had little to expect by way of cooperation from the mother. It is true that at this time Darrell Debose had given a statement and confessed, but at least the presentation of the Government is that Mrs. Debose, - they didn't really know what she would testify to.

I think in hindsight, it certainly would have been better to get clear at an early stage what she would testify to

because then, at that time, if in fact, there was any confusion about these photographs, that the Government would have known and the agent would have known about what Mrs. Debose's representation was about which photographs were shown to her.

As far as Evon Wright is concerned, I think the Government's argument that they could not expect to get full cooperation from Evon Wright perhaps has greater weight because Evon was well acquainted with the Burse family. She was very, very friendly with Kenny Burse, Maurice's brother and she was also a person who, because of the knowledge and the information she had, could well have been charged by the Government with the commission of a crime, so that the failure to call her, it seems to me, they have a better excuse for.

I find that under the rules, as they presently are, that the manner of presentation before the grand jury, although it could have been conducted in a better fashion, is not a violation sufficient enough to set aside the indictment.

It ought to be considered, nevertheless, in the overall picture as to how this case was handled by the Government to determine whether the motion for a new trial should be granted in the interest of justice.

Another point made by the defendant is that shortly after Debose was arrested, he told the FBI that a man by the name of Jimmy Barner committed the robbery with him. The facts were that shortly after that, Debose told the FBI Agent that Barner was a fiction and that really, it was Maurice and Gary Green. The defense, at an early stage, asked for Brady material. The Government said they had none. Another motion was made for Brady material and this revelation about Barner was not made. Finally, in the summer, during the trial of Gary Green when Debose testified, it came out during his testimony that indeed he had told the FBI Agent about this man Barner. The defense again asked for a fuller statement and the Government gave a fuzzy answer. Finally, on the eve of trial,

the prosecutor finally made an explicit statement that indeed this statement had been made to the FBI Agent.

I think the prosecutor in these tactics is certainly treading on dangerous ground but when you look at the overall picture, through diligent defense efforts and attention to the trial of Gary Green, defense did know that this statement was made to the FBI about Barner and, therefore, under the rules, it is not sufficient to grant a new trial, that in itself, but again, ought to be considered as a general picture of the prosecutorial attitude toward the case.

I have already discussed the Government did disclose that Barbara Ramos had looked at photographs and there was a hearing held to determine whether her contact with the officers was proper or not and after that hearing, we found that there was no prosecutorial misconduct and her testimony was permitted as to identification.

I have already discussed the difficulties with Mrs. Debose and that will be considered

on the overall picture.

In this case, at the end of the trial, the Government requested the Court to charge a violation of Title 18, Section 2. That is, the aiding and abetting statute. Because of the circumstances of this case and how the robbery occurred, it should have been apparent to anyone from the very beginning that an aiding and abetting charge was an appropriate one. It was not inserted in the indictment and the Government said under the rules, they were not required to, which, no question about it, is the rule. Nevertheless, during the discovery process, defense counsel asked the Government explicitly, "Are you going to ask, are you going to seek that this man be charged with any other violation", and the answer was a fuzzy wattling one and which was left up in the air. I believe that at that stage, the Government should have said, very clearly, "Yes, we are going to seek a charge based upon aiding and abetting", so that when we finished the trial and the Government then requested this additional charge, I refused

to charge it and then, of course, what happened, was the jury, looking at all the evidence, acquitted Maurice Burse on the other two counts here and I suppose that the Government believes that it was because of the failure to charge aiding and abetting and that may be so, but I think that when a demand for a bill of particulars is made, that the Court and defense are entitled to honest answers. In this score, we will consider it as part of the entire picture, but it seems to me that the Government has already paid a high price for their lack of candor in this particular respect.

We turn to the criticism of the summation made by the Assistant United States Attorney. We had discussed these at length in the prior argument. We have, of course, a number of cases in the Second Circuit have criticized again and again the tactics of the United States Attorneys in summations. What may be permitted in other courts, is not permitted in the Federal District Court.

In the White case, it appears, for example, that the record in that case, - this is 46 F2 204, the record in that case, the prosecutor charged a defendant with lying and said the defense was fabricated. The Court said, "These tactics are unwise and unnecessary. Although we might expect a character in a Perry Mason melodrama to point to the defendant in branding him a liar, such conduct is inconsistent with the duty of the prosecutor to seek justice, not merely to convict". In that case, the Court called the prosecutor's attention specifically to the ABA Code of Professional Responsibility and also to the ABA Project on Standards for Criminal Justice, standards relating to the prosecution function and the defense function in 1971.

I call again those particular standards to the attention of the United States Attorney's office. In Bavona, 487 F2, again the Court pointed out that the cases should be decided on the facts and not upon some flights of fancy and words of oratory

used by the prosecutor.

In this case, it is clear that a number of occasions the Court had or Mr. Stephens objected, I believe, that in almost every occasion, his objection was well taken. Perhaps there were one or two occasions when he jumped up too swiftly because the remarks of the prosecutor were about the confusing parts of the record where, perhaps, the prosecutor only laid out one side of the testimony and did not lay out the other. I think that either side in summing up is entitled to put the facts in the light most favorable to their side and neither the Government nor defense counsel are obliged to give the argument from both sides.

We have here some incidents. I think the remarks made about the fact that Mr. Debose was in the County Jail, really, I don't know whether that had any impact at all on the jury. Unfortunately, the Court, not being aware of all the facts, may not have accurately stated the record to the jury, but I do not believe that that

particular part of the summation had any unfair, - cannot be considered as unfair comment.

At Page 17, however, the Government said, "Unfortunately, there are people who rob banks. It appears to be more and more people all the time". These kind of remarks have absolutely no place at all in summation and should not have been made at all. We are not concerned with what happens, - in trying cases, we are concerned with what happens in a particular case. We are not concerned with the state of the nation or what happens in other communities or what happens in our community overnight or at any other time. At that time, I hope and I believe that my instruction cleared the air and the prosecutor should not have made the statement.

At Page 25, the prosecutor said, "What I am saying to you is that defendant didn't tell you about all the truths". In this case, the defendant did not testify and this certainly pointed up failure of the defendant to testify and it was improper

comment. In this line of the testimony, there was a point here and I do not think Mr. Stephens was up so much that I don't think he has the obligation to, under these circumstances, object to everything, but the line of argument used by the prosecutor here, the technique used is not to be approved. He began by saying at Page 24, "You know the defendant pointed out various things and by the defendant, I mean Mr. Stephens." Now, I think that when you are going to make an argument like this, you have got to say, "Mr. Stephens, the defense counsel", because right after that we go on for a page and a half and Mr. Stephens is not mentioned at all because the Government then said, - he said, "What he didn't tell you about and what is important here is the truth and we know that there was a meeting at the house. We know that they went to Lackawanna and we know that they went to Evon Wright's. We know that was the truth". Now, if the prosecutor said, "I", then it is clear that he is trying to testify rather than let the witnesses testify. The

use of the editorial "we" does not take the sting out of the argument that, "Ladies and gentlemen, I am the prosecutor, I am the representative of the United States Government and you ought to believe me". This kind of conduct has been disapproved on so many occasions that it ought to be clear to even an assistant trying a case for the first time that this kind of language should not be used at all.

He continues "We know they came back to Evon Wright's and that was the truth. We know they came back to Evon Wright's and that was the truth. We know that certain of those individuals, except for Darrell Debose left Evon Wright's and that was the truth", and then he gets into the comment, "What I am saying is the defendant didn't tell you about all the truths", and then there was an objection and again, at this stage, the Court attempted to set the record straight and I hope I did because clearly, there is no burden at all upon the defendant to make any explanation.

At Page 26, the prosecutor referred

to the statement of Darrell Debose. That statement was not in evidence. It is clear that from the very beginning we tell the jury, "You can only take into account what is in evidence in the case. You cannot speculate or surmise about statements made which are not in evidence", and again, this conduct should certainly not be used by the United States Attorney and again, the Court had to step in and attempt to set the record straight.

As to some of the things that happened after that about the discussion of the Barbara Ramos incident and the photograph, this appears to me to be a thing where there was much confusion and it could have been taken one way or the other.

Certainly, as far as Mrs. Stevens is concerned, who was a lady that told us about her drinking habits, the prosecutor misstated the testimony, but I think that it was clear to the jury that this was a mistake. I do not think this was an intentional error or an intentional statement made by the prosecutor. I just think that

he did not recall correctly the testimony of Mrs. Stevens and that frankly, it was a small part of the case because she just told us that she had some drinks that morning and then the prosecutor said that she was under the influence. That certainly is up to the jury to determine whether or not she was under the influence or not.

On the question about where the camera was located in the bank, whether Mr. Burse was there in the camera range or any individual would be in the camera range, and the Court said it appears the argument is based on speculation.

What does this all come down to? It comes down to what I think is this; I believe the jury very, very carefully listened to the evidence in this case. I believe that a lot of the things I have discussed here the Government did that they should not have done, but the jury did acquit the defendant on two counts. I believe that under the testimony given in this case, that the jury's verdict was a fair one. On the testimony of Darrell Debose alone,

they could have found Mr. Burse guilty of conspiracy. I feel that under all of the circumstances, that since we have the jury verdict, since we have had to wrestle with these problems throughout this case, that justice has been done in the overall circumstances.

I find that this was a most troublesome situation. I want to say to the United States Attorney's office that there should not be a repetition of the things that have occurred here, but in saying that, I again emphasize that I do not believe that injustice has been done in this particular case. It is pretty clear to me that the jury listened to all the evidence, to the summations and to the Court's charge and they made a dividing line and the line was a reasonable one because no one put Mr. Burse in the bank outside of Darrell Debose. There was the testimony of Darrell, the testimony of Barbara Ramos which, in a certain sense, corroborated his and it was for the jury to determine whether or not she was accurate, she was truthful, whether

she had the opportunity to observe. They also had the testimony of Evon Wright. Evon Wright was friendly with the Burse family. There would be, I suppose, a lot of reasons why she would try not to testify adversely to the interest of Maurice Burse but she did. There was the testimony of Mrs. Debose which I have previously discussed and it was the jury's problem here and I think, under the overall that I should not grant the motion for a new trial and, therefore, I will deny it.

Mr. Stephens, I have, - the presentence report has been delivered to me by the Probation office. You are entitled to examine it and I think we should have, maybe in a week's time, the 17th, - excuse me, the 24th, - no, I am sorry, the 17th.

MR. STEPHENS: For sentence, your Honor?

THE COURT: Can we have the sentence on the 17th, Mr. Stephens?

MR. STEPHENS: Fine, your Honor.

THE COURT: Mr. Stephens, thank you for your very vigorous advocacy in defense of this case.

MR. STEPHENS: Thank you, Judge, and I would like to

thank you on behalf of the defendant. You have, obviously, spent a great deal of time in considering our motions. We, apparently, will have to take our arguments elsewhere, but we were given the opportunity.

THE COURT: I think you have very strong arguments, Mr. Stephens, but on the overall picture, it seems to me that that is where the argument should be made, with the Appellate Court.

MR. STEPHENS: Thank you, Judge.

THE COURT: So they can look at this objectively and with a full record.

MR. STEPHENS: Thank you, your Honor, and the defendant and his attorney will be here on the 17th after I have looked at the Probation Report. Thank you, Judge.

THE COURT: All right.

* * * * * * * * * * * *